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CONVEYANCER'S NOTEBOOK

CORPORATE BODIES' CONTRACTS ACT, 1960

The common law rule that, with rare exceptions, contracts entered into by corporations must be under seal has not been of great importance for many years now because the rule does not apply to companies within the Companies Acts, but from time to time some unfortunate person finds that a local authority avoid paying their just debts because the contract has not been sealed by them. The Corporate Bodies' Contracts Act, 1960, which received the Royal Assent and came into force on July 29, abolishes the rule for corporations other than companies and provides that contracts made on behalf of any corporation, wherever incorporated, may be made in the same way as in the case of private persons, *i.e.*, where the general law requires a contract to be in writing, signed by the parties to be charged therewith, it may be made on behalf of a corporation in writing signed by any person acting under its authority express or implied; and where under the general law a contract may be purely oral, it may be entered into orally on behalf of the corporation by any person acting under its authority, express or implied. So far as companies are concerned section 32 of the Companies Act, 1948, still governs the position.

PAYMENT OF WAGES ACT, 1960

No doubt when the Truck Act was passed it served to limit and eventually put an end to a very serious abuse, but of recent years the Act has been a nuisance. Deductions to pay for shares have been held void and even deductions under pension schemes are doubtful. The size of wage packets has brought a desire to pay by cheque. The Payment of Wages Act, 1960, which received the Royal Assent on June 2, has sought to permit this but the language of the Act is

tortuous and the conditions irksome. "If", says section 1 (1), "an employed person requests his employer to pay his wages in a way specified in the request, being one of the ways authorised by this Act, and the employer agrees to that request, nothing in the enactments mentioned in the next following subsection shall operate (a) so as to render that request, or the employer's agreement thereto, unlawful, or" etc. etc., for another six lines. If so agreed, payment may be by postal order, money order, cheque payable to, or to the order of, the employee or by banker's order into an account in the name of the employee alone or the employee jointly with another or others. There are various other conditions. No doubt to enable the unfortunate employer to digest the nine sections and three-page schedule, the main part of the Act does not come into force until six months after its passing. Section 4, which came into force on July 2, enables wages to be paid by money order or postal order when the employee is absent unless the employee has previously notified the employer that he does not wish to be paid this way.

Offices Act, 1960

It seems logical that the Factory and Shops Acts should be followed by an Offices Act, which received the Royal Assent on July 29, but does not come into force until January 1, 1962. Regulations may be made for securing the health, safety and welfare of office workers. Assuming that the Act is reasonably applied, a reasonable employer has little to fear. There are still too many offices with inadequate or unsatisfactory lavatory accommodation. The Act extends to sanitary conveniences, washing facilities, including the provision of hot and cold water, soap and towels, overcrowding, lighting, heating, ventilation, office cleaning, drinking water and first-aid equipment. When the regulations are made it may be necessary to make alterations to offices not permitted by a lease relating to them. In such a case application may be made to the county court which may make an order modifying the lease. If the applicant considers that part of the expense should fall on some other person having an interest in the premises he may apply to the county court which can make such order (having regard to the terms of the lease) as it considers just and equitable in the circumstances of the case.

Land Registry Pamphlet

The question whether a solicitor should advise his client to register his title voluntarily is often a delicate one. Where the client has bought the land with a view to development and selling

off in plots, the solicitor is clearly failing in his duty if he does not advise registration. Where, however, the client has purchased a house in some cases the additional modest cost of registration (together with a possible survey fee) may not outweigh the saving achieved on subsequent sale when perhaps the client is more affluent and the middle course of registering subsequent to purchase is rarely adopted. The Land Registry have just issued a pamphlet entitled "Registration of Title to Land" (H.M.S.O. 3s.) which explains clearly and simply how registration works, what savings may be effected and what the advantages are. There are cases where solicitors are asked by their clients whether they should register or not and this pamphlet might well provide the best answer.

THE FINANCE ACT, 1960—A SUMMARY

By John Cherryman, Barrister-at-Law

This year's Finance Act brings about a slight net increase in taxation. Certain income tax personal allowances are increased and estate duty on gifts more than two years old is reduced, but these reductions in taxation are more than counterbalanced by increases in tobacco duty and profits tax.

The greater part of the Act is taken up with measures against tax avoidance in its various forms, against which a determined onslaught is made in response to growing pressure, and a complete reform of the law relating to income tax penalties, which was long overdue. The result is an act of bewildering complexity comprising seventy-nine sections and eight schedules.

In this article, an attempt is made to summarise the main provisions of the Act, emphasis being given to those sections which are likely to be of greatest interest to readers of *The Conveyancer*.

Customs and Excise

Part I of the Act is chiefly memorable to the man in the street by reason of the fact that, by section 5, tobacco duty is increased by 3s. 4d. in the pound, which is equivalent to an additional 2d. on a packet of untipped cigarettes. The Chancellor estimated that this increase in duty would yield £40,000,000 in a full year. One wonders whether he took into account the swing from untipped to the cheaper, tipped cigarettes which occurred after the Budget. This draconian measure is partly tempered by the fact that entertainments duty is abolished,[1] as also is the 250-year-old duty on playing-cards.[2] Furthermore, duty on heavy wines, British wines and light wines imported in bottles (including champagne) is reduced.[3]

Sections 1 and 2 of the Road Traffic Act, 1956, which provide for the compulsory testing of motor vehicles, have again required amendment. It was provided by section 8 of the Finance Act, 1958 that no licence would be required for taking an untested car to a test, or taking away a car that had failed. However, such provision did not legalise the use of an unlicensed car during the test itself. This defect is now remedied by section 13 of the new

[1] Finance Act, 1960, s. 4.
[2] *Ibid.*, s. 8.
[3] *Ibid.*, ss. 1 and 2.

Act. None of the other provisions in Part I of the Act is of general interest.

Income Tax

General provisions

The standard rate of income tax for the year 1960–61 is maintained unchanged at 7s. 9d. in the pound, whilst the rate of surtax is left to be determined at a later date.[4] Persons who are not entitled to claim the married persons relief [5] and married men who can claim such relief, but whose wives are totally incapacitated, are given a valuable new relief of £40 a year [6] if they are entitled to claim child relief [7] and cannot claim relief in respect of a housekeeper,[8] or (if unmarried) a female relation taking charge of a younger brother or sister,[9] or a resident female maintained or employed to look after children.[10] This new relief is not available to women who are not widows and who would otherwise qualify, but are not working full-time or are not totally incapacitated. Section 18 of the new Act increases from £60 to £75 a year the reliefs in respect of housekeepers,[11] female relatives caring for unmarried persons' younger brothers or sisters,[12] dependent relatives [13] and nannies or persons in the position of nannies.[14] Where the dependent relative's income exceeds £210 a year, no relief is available. Having regard to the introduction of the new graduated contribution National Insurance scheme, a new method of calculating relief for National Insurance contributions is provided by section 19, in substitution for section 377 (2) of the Income Tax Act, 1952.

By virtue of Part VII of the Income Tax Act, 1952 "small maintenance payments" are made without deduction of tax. Previously the definition of "small maintenance payments" has been limited, as to value, to payments not exceeding £5 a week to a woman and £1 10s. 0d. a week to persons under twenty-one years.[15] These limits are now raised respectively to £7 10s. 0d. and £2 10s. 0d.[16] The definition has also been further extended, in particular to include payments made to the husband as well as to the wife, and to cases where the marriage has been annulled.[17]

4 *Ibid.*, s. 15.
5 Income Tax Act, 1952, s. 210 (1) (*a*).
6 Finance Act, 1960, s. 17.
7 Income Tax Act, 1952, s. 212.
8 *Ibid.*, s. 214.
9 *Ibid.*, s. 215.
10 *Ibid.*, s. 218.
11 *Ibid.*, s. 214.
12 *Ibid.*, s. 215.
13 *Ibid.*, s. 216.
14 *Ibid.*, s. 218.
15 *Ibid.*, s. 205 as amended by Finance Act, 1957, s. 21.
16 Finance Act, 1960, s. 40 (1) (*c*).
17 *Ibid.*, s. 40 (1) (*a*).

Restriction of loss relief

Hitherto, it has been possible, in appropriate cases, to obtain relief in respect of trading losses under any one of three separate sections of the Income Tax Act, 1952, namely:

(1) section 142: whereunder a person who carries on two or more distinct trades, can set off a loss incurred in one trade against the profits of the other trade or trades;

(2) section 341: whereunder a person who sustains a trading loss in any year can elect to recover tax on a proportion of the aggregate amount of the income of the same year or the following year,[18] equal to the loss sustained; and

(3) section 342: whereunder a person who sustains a trading loss in respect of which he does not otherwise obtain relief may claim that such loss shall be carried forward and set off against future assessments of the profits of the same business without any time-limit.[19]

Section 142 has been most useful for tax avoidance purposes. On account of the special rules applicable for assessment in the early years of a business, it has been possible to set up a business which incurs a loss in its initial trading period, which loss is then set off against the profits of another business for two or three years. This practice proved very painful to the Revenue, so that the radical step has been taken of repealing section 142 in respect of losses of any accounting period ending after April 5, 1960.[20]

Section 341 has been the joy of all "hobby farmers" and other traders who have been able happily to trade at a loss in the certain knowledge that they could recover tax paid on other income equivalent to the loss. Now this alleged abuse of the section is stamped out by section 20 (1) and (2) of the new Act, which provides that losses (including capital allowances treated as losses[21]) and subvention payments[22] shall not be available for relief under the section, for the year 1960–61 or any subsequent year of assessment, unless it is shown:

> "that the trade was being carried on for that year of assessment on a commercial basis and with a view to the realisation of profits in the trade or, where the carrying on of the trade formed part of a larger undertaking, in the undertaking as a whole."

It will be noted that the onus of proof in establishing that relief

[18] Finance Act, 1953, s. 15 (3).
[19] Finance Act, 1952, s. 27 (1).
[20] Finance Act, 1960, s. 20 (8).
[21] By Finance Act, 1954, s. 20.
[22] Under Finance Act, 1953, s. 20.

should be given is upon the taxpayer. Although the test whether a business is being carried on with a view to the realisation of profits is not new to taxing statutes,[23] it was thought fit to provide further that the fact that a trade was being carried on at any time so as to afford a reasonable expectation of profits, shall be *conclusive* evidence that it has then been carried on with a view to the realisation of profits.[24] The new section applies to professions and vocations as well as to trades.[25]

The relief available under section 342 of the Income Tax Act, 1952, is not cut down in any way. It can still be resorted to by the " hobby farmer " who surprises everyone and makes his farm pay. It is, of course, the reason why shares in " tax loss " companies can be sold profitably. By " tax loss " company is meant a company with accumulated trading losses, which is still trading. A purchaser of its shares who can eventually make its business profitable reaps a rich reward, for the earlier losses can be set off against the future profits.

Daylight robbery?

Sections 21 to 24 of the new Act, are designed to penalise and inhibit what one member called in committee " almost daylight robbery of the public by property sharks." The alleged " daylight robbery " has been taking place in the following circumstances. T Company is formed for the purpose of trading in land and buildings and, in particular, of erecting an office building and selling the same to I Company which intends to hold it, as an investment. Clearly, if T Company in fact sells the building which is part of its trading stock, it will suffer tax on the resulting profit. However, what has been done is that instead of T Company selling the actual building, the members of that company sell their shares to I Company for a price which is equivalent to the value of the building and any other assets of T Company. By this simple device, the shareholders in T Company have been able to turn what would have otherwise been a taxable trading profit of their company into a fat tax-free capital profit for themselves.

Such devices are now countered by section 21, which applies in the case of a company carrying on a trade of dealing in securities or land or buildings or of developing land, or any other trade where the value of any one object in its trading stock amounts to one-fifth of

[23] The same test has been applied, apparently without difficulty, for many years in connection with elections to be charged to tax with regard to woodlands under Schedule D: see Income Tax Act, 1952, s. 125 (1).

[24] Finance Act, 1960, s. 20 (6).

[25] *Ibid.*, s. 20 (7).

the value of its net assets. If shares in such a company are sold after April 5, 1960, to a person who has or thereby gains control [26] of the company, so that the purchase price would, apart from the new legislation, be capital, the first condition for the operation of the section is complied with.[27] The second condition for its operation is broadly whether after the sale of the shares, the trading stock will or will not continue to be used as trading stock.[28] The onus is upon the vendor of the shares to prove to the satisfaction of the Commissioners that all the trading stock of the company at the time of the sale has been or will be disposed of, either in the course of its trade or to a person carrying on a trade such that the stock will be trading stock in his hands. Presumably such matters could be readily established if the sale of the shares is made subject to a special condition ensuring that the stock will remain trading stock (if a purchaser can be found who will accept such a condition). If the vendor is unable to satisfy the Commissioners on this point, then part of the purchase price received by him or his shares is deemed to be his income and chargeable to tax under Case VI of Schedule D.[29] The relevant part of the purchase price which is to be treated as income is calculated according to an exceedingly complex formula [30] and is roughly the appropriate proportion (having regard to the number of shares sold) of the taxable profits which would have been produced by the company receiving at the time of the sale, consideration for the sale of its trading stock equal to what would have been the price paid for all the shares in the company if they had been sold. Such price is calculated having regard to the amount in fact paid for the shares actually sold: liabilities, capital allowances, the value of goodwill and non-trading assets are also taken into account. Any tax chargeable on a seller of shares under these provisions which is not paid by him is recoverable from the company in question.[31]

Where part of the consideration for the sale of shares would have been treated as the income of the seller, if the Commissioners had not been satisfied that the stock of the company would continue to be used as trading stock and, on the sixth anniversary of such sale any such stock or any part thereof is still held by the company, then, unless it is proved that the trade has been discontinued, or

[26] Within the meaning given to that term by section 333 (1) of Income Tax Act, 1952; see Finance Act, 1960, s. 43 (4) (*c*).

[27] Finance Act, 1960, s. 21 (1) it should be noted that the section does not appear to apply at all either to a sale of debentures, or to an exchange of shares.

[28] *Ibid.*, s. 21 (2).

[29] *Ibid.*

[30] *Ibid.*, s. 21 (3), (5), (6) and (7).

[31] *Ibid.*, s. 21 (8).

that the stock was retained in connection with the trade, such part as aforesaid of the consideration received for the sale of the shares is to be deemed to have been received by the company and to be chargeable to tax under Case VI of Schedule D.[32]

Subsections (4) and (11) of section 21 enable relief to be given from the strict application of section 21, where injustice would otherwise result. The former subsection provides that where the part of the consideration received for the sale of shares which is treated as taxable income of the seller, is greater than the actual profit made by the seller on the sale and, immediately before the time of the sale, the seller owned less than 5 per cent. of the issued capital of the company (which he did not acquire pursuant to an arrangement for transferring control) or section 21 had been applied on a previous sale of the shares, then, the seller is given an opportunity to apply for relief. In such circumstances, the Commissioners must give such relief as may be reasonable and just. Subsection (11) provides that where after a sale of shares, any receipts accrue from the sale of stock which was trading stock when the shares were sold, such receipts are to be disregarded for tax purposes to such an extent as is just having regard to any tax charged on the seller with regard to the sale of the shares.

Section 21 (9) is a valuable provision which enables persons proposing to enter into a transaction in shares which would be caught by subsection (1) to obtain a decision from the Commissioners whether or not subsection (2) would be applied if such transaction were effected, in order to render part of the consideration to be received by the seller taxable in his hands.

The provisions of section 21 are applied by section 22 (1) to the case where shares in an investment company, whose activities consist of or include the erection of a building, are sold after building has commenced, or within six years of the completion of the building, provided that at the time of the sale the company has an interest in the building and the value of that interest and any interest in other buildings recently erected by the company exceeds one-fifth of its net assets. In such cases, the company is treated for the purposes of section 21 as carrying on a trade wherein such interests in recently erected buildings are the trading stock. This provision does not apply, however, when the shares are sold to a company and the shares in each company are held by the same person or persons in the same proportions.

Hitherto, it has been possible for the members of an investment company which is erecting a building, to take in tax-free form the

[32] *Ibid.*, s. 21 (10).

profit accruing from the building by winding up the company when erection is complete. This gambit is now no longer effective, by reason of section 22 (4) which provides broadly, that in such circumstances the company is to be treated for income tax purposes as having received immediately before the commencement of winding up, untaxed profits chargeable under Case VI of Schedule D of an amount equal to the profits which the company would have received as a result of an open market sale of the building in the course of trade. Nevertheless, the company still escapes taxation where it is a wholly owned subsidiary of another company which, within a year of the commencement of the winding up of its subsidiary, elects that if in the winding up it acquires the interest of the subsidiary in the building, section 22 shall not apply to the latter company, but that if the parent company sells such interest it shall be taxed on what its profit would have been if such interest had been its trading stock.

Section 23 extends the ambit of sections 21 and 22 to catch cases where control of the relevant company is sold by a sale of shares in a holding company. Sales to nominees are also caught.[33] Sales of associated parcels of shares giving control of the relevant company are all treated as having taken place at the time when control was actually obtained.[34] Parcels of shares are treated as associated where they belong directly or through a controlled company or trustees to the same person, or to two or more related persons or to partners (including a partner's relatives).[35]

The main criticism of sections 21 to 24 is that the net cast may have too fine a mesh. In other words, an innocent owner of shares in a company trading in property may well become subject to tax under these sections on part of the proceeds of sale of such shares, if he unwittingly sells his shares to a person who controls such company or who thereby gains control. It is true that in some cases relief can be obtained under section 21 (4),[36] but this relief does not cover all cases and, moreover depends upon the Commissioners' concept of what is reasonable and just. Unhappily, the small investor is not in a position to insist on an indemnity against tax liability on a sale of his shares, so that if an assessment is made, he will be forced to rely on relief under section 21 (4) (if applicable in the circumstances of his case). Any vendor of shares in a company within the class created by section 21 (1) (as extended by section 22 (1)), who owns more than 5 per cent. of the issued share

[33] *Ibid.*, s. 24 (4).
[34] *Ibid.*, s. 24 (1).
[35] *Ibid.*, s. 24 (2).
[36] See above.

capital at the time of sale, certainly ought, for his own protection, to obtain either a Revenue clearance of the transaction under section 21 (9), or an indemnity from the purchaser against possible liability for tax under these sections, unless he is satisfied that the purchaser does not have and will not as a result of the sale obtain control of the company. This warning is particularly important in connection with take-over bids.

Doubts exist whether the enactment of sections 21 to 24 was strictly necessary in order to counter many of the activities of "the property sharks." There already existed in the armoury of the Revenue a little-used weapon which had great potentialities in the battle against the "daylight robbery" referred to above. This weapon was the principle in the Court of Appeal decision of *Associated London Properties, Ltd.* v. *Henriksen*.[37] In that case, the appellant company (which dealt in land), in association with another person, formed a company to purchase and develop a site. In due course, a building was erected on the site and then the appellant company sold its shares in the development company to its associate at a substantial profit. The Commissioners found that such profit was made in the ordinary course of the company's trade and was therefore liable to tax. Lord Greene M.R., in endorsing the findings of the Commissioners, said:

> "In fact the Commissioners are finding . . . that, it being the business of the Appellants to deal in real estate, this was the particular method of dealing in real estate which they happened to adopt, and, therefore, must be treated as a method of exploiting its real estate assets just as though they had made a direct sale to a purchaser out and out. There is nothing in law which prevents the Commissioners from finding as a fact that a profit made in these circumstances is to be treated as a profit made in the ordinary course of the Appellant's business." [38]

One wonders why the Revenue did not choose to apply this highly effective argument in other cases.

Further measures against specific tax avoidance devices

Sections 25 to 27 contain complicated provisions, designed to combat certain specific tax avoidance devices which have come to light. It is impossible to do justice to these sections in an article summarising the whole Act, so the main provisions only are noted briefly here.

Section 25 deals with cases where assets are switched between associated investment companies and dealing companies so that the

[37] (1944) 26 T.C. p. 46.
[38] *Ibid.*, at p. 53.

proper tax on profits arising from what is in substance dealing, is avoided and such profits are taken in the guise of capital appreciation. Companies are treated as "associated" if one has control of both or all of them, or any person has control of both or all of them.[39] The chief measure adopted is to treat as income any profit made by an investment company on a sale by it of an asset acquired from an associated dealing company or on a sale of an asset to an associated dealing company.[40] This measure cannot be avoided by putting the investment company into liquidation so that the liquidator sells the relevant asset.[41] Nor can a tax-free profit be reaped if, instead of an asset being sold by an investment company to an associated dealing company, shares in the former company are sold to the latter. This type of transaction is caught by section 26, whereunder the consideration received on the sale of the shares is deemed to be the income of the vendor up to the amount of the profit which the investment company would have received had it sold at the same price to the dealing company part of its assets proportionate to the shares sold. It is further provided that, where a dealing company is entitled to deduct from its taxable profits any depreciation in value of a right subsisting against an associated investment company, or, the former company makes a payment to the latter from which tax is deducted and, in either case the depreciation or payment is not brought into the computation of the profits of the investment company, then in such circumstances the latter company is treated as having received income of an amount equal to the sums deducted by the dealing company.[42]

Section 27 strikes at the case where a person buys securities ex dividend and sells them cum dividend, although having no right to receive the dividend himself. The dividend is then paid less tax to the purchaser, who may, if he pays no tax, be entitled to recover the tax from the Revenue. At the same time, the Revenue may also be liable to refund the tax deducted in respect of the same dividend, to the person who sold ex dividend. The seller makes a profit out of such transaction because the difference between the cum dividend and ex dividend price of the securities is greater than the net amount of the dividend which has to be paid over to the purchaser. In effect, the profit is made by putting the Revenue to the risk of having to repay tax which can never reach the Exchequer! This form of device is now neatly countered by section 27,

[39] Finance Act, 1960, s. 43 (1).
[40] *Ibid.*, s. 25 (1).
[41] *Ibid.*, s. 25 (5).
[42] *Ibid.*, s. 25 (4).

which provides that where a seller of securities deducts tax from a dividend which he has no title to receive, but which he has to pay to the purchaser, he becomes liable to account for the tax deducted under section 170 of the Income Tax Act, 1952.

Power to nullify tax advantages gained from certain transactions in securities

It has proved impossible to prevent widescale tax avoidance in connection with transactions in securities simply by enacting provisions of limited application in order to deal with each new loophole in the law which came to light.[43] Persons concerned to obtain tax advantages have always been one jump ahead of the Revenue. To use a horticultural metaphor, pruning the dividend-stripping tree has only served to stimulate new growth. The government therefore decided that the time had come to destroy the tree, root and branch. The method adopted has been to enact a general provision against tax avoidance in this field, enabling the Revenue to nullify tax advantages that could otherwise be gained under the general law.

Section 28 of the new Act is brought into operation where in any of the circumstances specified in subsection (2) thereof, in consequence of a transaction or transactions in securities carried out after April 5, 1960, a person obtains or is in a position to obtain a tax advantage, unless he shows that the transaction or transactions in question were affected either for bona fide commercial reasons or in the ordinary course of making or managing investments and that none of them was carried out in order to gain tax advantages.[44] "Transaction in securities" is defined to include transactions of any description.[45] "Tax advantage" means relief from, repayment, avoidance or reduction of income tax.[46] The circumstances mentioned in subsection (2) of the section are:

(a) where a person, entitled to recover tax on dividends received by him, receives an abnormal amount by way of dividend;

(b) where a person is entitled to a deduction for the fall in value of securities resulting from the payment of dividends;

(c) where in a transaction, in which some other person is caught by (a) or (b) above, a person receives in capital

[43] *e.g.*, Finance (No. 2) Act, 1955, s. 4.
[44] Finance Act, 1960, s. 28 (1).
[45] *Ibid.*, s. 43 (4) (*i*).
[46] *Ibid.*, s. 43 (4) (*g*).

form consideration representing the future profits of the company or its trading stock; and

(d) where such a consideration is received in connection with the distribution of profits of a company which is controlled by not more than five persons and is not publicly quoted.

Where the section applies, the tax advantage gained is to be counteracted by an assessment, additional assessment, repayment, return of tax refunded or adjustment of computation on such basis as the Commissioners may specify in a notice to the person in question.[47] Where the Commissioners have reason to believe that the section may apply, they must, before serving a notice applying the same, first give notice to the person in question of that fact. Such person then has a chance to show cause why the section should not apply. If the new tribunal which has been set up decides that there is no prima facie case for proceeding in the matter, the section will not apply.[48] When a notice applying the section is given, the taxpayer has a right of appeal to the Special Commissioners with an opportunity to have the appeal reheard by the tribunal.[49] The provisions of section 247 of the Income Tax Act, 1952, with regard to appeals, rehearings and the statement of a case on a point of law in cases of appeals against surtax directions, apply (with modifications) to appeals under section 28 to the Special Commissioners and the tribunal.[50] The new tribunal is to consist of a chairman appointed by the Lord Chancellor and two or more other persons also appointed by the Lord Chancellor, having special knowledge or experience of financial or commercial matters.[51]

The new section has been the subject of much debate both in and out of Parliament. Although it will undoubtedly be an effective deterrent to would-be tax avoiders, nevertheless, this end is achieved by questionable means. The vice of the section is that in the case of many transactions in securities the parties will not know what their potential tax liability will be. It is true that it is possible to apply for a clearance under section 28 (10), but very often it will not be practicable to adopt this course owing to shortage of time or lack of information. The section may therefore have the result of stifling legitimate business deals where the parties are unwilling to run the risk of being caught by its provisions.

[47] *Ibid.*, s. 28 (3).
[48] *Ibid.*, s. 28 (4) and (5).
[49] *Ibid.*, s. 28 (6).
[50] *Ibid.*, s. 28 (8).
[51] *Ibid.*, ss. 28 (7) and 30.

Post-cessation receipts

Section 32 of the new Act provides for taxation under Case VI of Schedule D of receipts which accrue after a trade, profession or vocation has been permanently discontinued. It nullifies the effect of the decisions of the House of Lords in *Stainer's Executors* v. *Purchase* [52] and *Carson* v. *Cheyney's Executor*.[53] In the former case, it was held that royalties arising from films made by the late Leslie Howard received by his executors after his death were not taxable, because such receipts were to be treated as already covered by assessments made during the actor's lifetime while he was still practising his profession. In the latter case, the same principle was applied with regard to copyright royalties received after the death of an author.

The new section brings into the charge to tax the following sums arising before permanent discontinuance from the trade, profession or vocation:

(1) where profits have been computed on the earnings basis, all such sums the value whereof was not brought into account before discontinuance;

(2) where profits have been computed on the cash basis, all sums which, if the earnings basis had been applicable, would not have been brought into account before discontinuance because they would not have become due or ascertained by then.[54]

The first heading covers the case where commission does not become due until the business in which it has been earned ceases. The second heading covers receipts such as the recovery of a debt wholly or partly written off during the continuance of the business. The government encountered a great deal of criticism by reason of the fact that the second heading does not catch post-cessation receipts of retired barristers (whose profits are invariably computed on the cash basis), since such receipts if computed on the earnings basis would be brought into account before discontinuance.

The government supported their position on this point by arguing that the Bar must be treated differently from most other professions since barristers cannot sue for their fees. To some, this savoured of special pleading. At all events, it is clear that in the event of a change of government, the barrister's tax-free retirement nest egg will soon be caught in the clutches of the Revenue.

The section is expressly [55] made inapplicable to income arising

[52] [1952] A.C. 280.
[53] [1959] A.C. 412.
[54] Finance Act, 1960, s. 32 (2).
[55] *Ibid.*, s. 32 (3).

outside of the United Kingdom received by a non-resident, a lump sum paid to an author's personal representatives on the assignment of copyright and the proceeds of sale of trading stock,[56] and work in progress.[57] Certain deductions and allowances are permitted in computing any amount chargeable to tax under the section.[58] It is provided that if the right to receive sums caught by section 32 is sold or transferred, tax is to be charged with reference to the consideration, or if there is no arm's length sale, the value of the right transferred on such a sale.[59] Sums chargeable to tax under section 32 are to be treated as earned income in the case of individuals.[60] Where the trade in question is discontinued, on the winding up of a company which is controlled for the purpose of surtax directions and is not not an investment company, the sums chargeable to tax under the section are deemed to be income of the members for surtax purposes.[61]

Where a change occurs in the constitution of a partnership, the business is treated as discontinued for tax purposes unless all the partners elect that tax shall be payable as if the business had continued.[62] Section 34 provides that where a partnership is treated as discontinued on a change, post-cessation receipts shall be taxed under section 32. However, where the right to receive sums caught by section 32 is transferred to the continuing partners, such sums are to be treated as receipts of the business in the period when they are received.[63]

Debts set off against profits and subsequently released

It was held by the House of Lords in 1932 in the case of *British Mexican Petroleum Co., Ltd.* v. *C.I.R.*[64] that the release by a creditor of a debt owing to him by a trader, which the trader had previously deducted in computing his profits, does not give rise to a trading receipt. The effect of this decision has now been nullified by section 36 which provides that where the whole or part of such a debt is released, the amount released is to be treated as a trading receipt for the period in which the release occurs.

Taxation of the " golden handshake "

Hitherto, a lump sum paid to an employee on his retirement has been wholly free of tax if either it represented compensation for loss

56 Taxed under Income Tax Act, 1952, s. 143.
57 Taxed under Finance Act, 1960, s. 35.
58 Finance Act, 1960, s. 32 (4).
59 *Ibid.*, s. 33 (1).
60 *Ibid.*, s. 33 (2).
61 *Ibid.*, s. 33 (4).
62 Finance Act, 1953, s. 19.
63 Finance Act, 1960, s. 34 (2).
64 (1932) 16 T.C. 570.

of office or a gratuity not received as a reward for services. This position has for some time been giving rise to much comment in certain cases where particularly large payments have been made to directors who have ceased to hold office after their companies have been taken over, and also in certain other cases where payments dressed up as compensation for loss of office have been really additional remuneration. Such payments are still exempt from tax if they do not exceed £5,000, as are the first £5,000 of sums exceeding that figure.[65]

Section 37 now brings within the charge to tax under Schedule E, payments exceeding £5,000 made, whether under any legal obligation or not, either directly or indirectly in consideration or in consequence of or otherwise in connection with the termination of an office of employment.[66] The section applies whether the payment is made directly to the employee or to his wife, or any relation or dependant.[67] Further, the section also applies whether the payment is made by the employer or any other person,[68] a provision designed to catch cases where a director of a company which is being taken over, is "bought out" by the acquiring company or its directors. The next section sets out a number of exemptions from tax under section 37. The principal cases exempted are: payments arising from death, injury or disability, sums paid in consideration of certain restrictive covenants,[69] benefits under unapproved pension schemes where the employee has been taxed on contributions[70] and benefits under "top-hat schemes."[71] Certain reliefs from tax under section 37 are available, namely, by reduction of the sum chargeable in the case of payments other than compensation for loss of office, and by reduction of tax by notionally spreading the tax over a number of years.[72]

It should be noted that the principle in *British Transport Commission* v. *Gourley*[73] is not affected by the new provisions. Such provisions are merely a further factor the courts must take into account in assessing damages in cases where the principle applies.

[65] Finance Act, 1960, s. 38 (3).
[66] *Ibid.*, s. 37 (1) and (2).
[67] *Ibid.*, s. 37 (3).
[68] *Ibid.*, s. 37 (1).
[69] And chargeable to surtax under Income Tax Act, 1952, s. 242.
[70] Income Tax Act, 1952, s. 386.
[71] *Ibid.*, s. 387.
[72] Finance Act, 1960, s. 38 (4) and Fourth Sched., an exceedingly complicated provision.
[73] [1956] A.C. 185.

Income Tax and Profits Tax (Penalties and Assessments)

The law relating to penalties and assessments had been the subject of judicial strictures in the recent case of *I. R. C.* v. *Hinchy*.[74] Part III of the new Act, which is a direct result of that case, completely reforms the law on the matter with the object of making "the punishment fit the crime." The new provisions are comprised in twenty sections and a schedule, and could not adequately be summarised except in an article relating solely thereto. It is hoped that the omission from these pages of a discussion of the subject will be excused.

Estate Duty

Graduation of the charge in respect of gifts

Before the passing of the Finance Act, 1960, in general, no relief from estate duty in respect of a gift *inter vivos* was obtained, unless the donor survived the making of the gift for the full period of five years, and the donee assumed bona fide possession and enjoyment of the property immediately upon the gift, which he either thenceforward retained or, in any event, enjoyed for the five years preceding the death of the donor to the entire exclusion of the latter, or of any benefit to him by contract or otherwise.[75]

When estate duty was introduced by the Finance Act, 1894, the period by which it was necessary that a donor should survive the making of a gift in order to ensure that the same would escape duty, was only a year, so that there was hardly room for any mitigation of the charge to duty in cases where the donor died within the year following the gift, particularly having regard to the fact that the maximum rate at which duty was then levied was eight per cent.[76] The relevant period was extended to three years in 1910,[77] and ultimately to five years in 1946,[78] while at the same time the rates of estate duty have been progressively increased so that the top rate is now eighty per cent.[79] However, not until this year has any provision been made for graduation of the duty chargeable on gifts made by donors who do not survive the relevant period. Thus, the extraordinary position was reached that, on the one hand, if a donor survived the making of gifts by five years all but a day, his gifts would be chargeable at the same rate of duty as would have been

[74] [1960] 2 W.L.R. 448.
[75] Finance Act, 1894, s. 2 (1) (*c*), Customs and Inland Revenue Act, 1881, s. 38 (2) (*a*), Customs and Inland Revenue Act, 1889, s. 11 (1), Finance (1909-10) Act 1910, s. 59 (1) and (3) and Finance Act, 1946, s. 47.
[76] Finance Act, 1894, s. 17.
[77] Finance (1909–10) Act, 1910, s. 59 (1).
[78] Finance Act, 1946, s. 47 and 11th Sched.
[79] Finance Act, 1949, s. 28 (1) and 7th Sched.

levied if he had died the day after making them, while, on the other hand, if he had survived the five-year period, the gifts would have been exempt from duty. This situation was a cause of great concern to settlors of all ages. Indeed, worry about whether he would survive the five-year period after making a gift must have brought about the premature demise of many an ailing settlor! On the brighter side, however, it should be recorded that the need to survive the five-year period in order to "cheat the Revenue" has given some settlors a new lease of life.

The existing law is reformed by section 64 of the new Act, which provides in the case of deaths after April 4, 1960, for a general reduction of duty if the donor survives the gift by two years. If the death takes place in the third, fourth or fifth year of the five-year period, the principal value of the property the subject of the gift will be reduced by fifteen per cent. in the third year, thirty per cent. in the fourth year and sixty per cent. in the fifth year.[80] The five-year period is, of course, measured from the date of the gift.

The new provisions apply not only to gifts properly so called, but also to "any other relevant disposition or event," which expression is defined[81] in a rather cumbersome fashion to include certain other dispositions and transactions which fall to be treated as gifts under the existing law.[82] The relief does not apply where, by reason of a benefit reserved, exemption after five years could not be claimed.[83] However, if the benefit reserved is released, so that the five-year period begins to run, then in the third, fourth and fifth years of such period the new relief is obtained.[84] Where the value of the dutiable property is reduced by deduction of partial consideration or any amount treated as partial consideration,[85] the relief applies after allowance for such deductions.[86] Under the existing law, immediate exemption from duty is obtained in respect of a gift not exceeding £100 in value.[87] Further, gifts to any one donee which are not settled are also exempt if the gifts are without benefit reserved and the value of all gifts (whether settled or not)

80 Finance Act, 1960, s. 64 (1).
81 *Ibid.*, s. 64 (2).
82 *i.e.*, under Finance Act, 1939, s. 31 (2) (disallowance of certain debts for estate duty valuation); Finance Act, 1940, s. 44 (disposition in favour of a relative); *ibid.*, s. 45 (creation or extinguishment of a debt or other right); *ibid.*, s. 43 (1) (disposition or determination of a life interest); Finance Act, 1950, s. 45 (disposition in respect of a parliamentary settled estate); Finance Act, 1958, s. 28 (1) (*b*) (purchase of an interest in expectancy); and Finance Act, 1959 s. 34 (2) (payment of a premium on a life policy).
83 Finance Act, 1960, s. 64 (3) (*a*).
84 *Ibid.*, s. 64 (3) (*b*).
85 Under Finance Act, 1894, s. 3 (2); the combined effect of Finance Act, 1940, s. 44 (1) and Finance Act, 1944, s. 40 (2); and Finance Act, 1958, s. 28 (8).
86 Finance Act, 1960, s. 64 (4).
87 Finance (1909–10) Act, 1910, s. 59 (2).

to such donee does not exceed £500.[88] Certain marginal relief is given where the gifts slightly exceed £500.[89] Exemption is also obtained in respect of gifts which have been part of the normal expenditure of the deceased and have been reasonable in the circumstances.[90] These minor exemptions from duty are not affected by the new provisions.[91] Further, the new Act does not apply to gifts made for public or charitable purposes which become exempt from duty if made one year before the death of the donor.[92]

When the 1960 Finance Bill was first introduced, it contained no provision extending the reduction of duty on gifts more than two years old (considered above) to cases arising under section 46 of the Finance Act, 1940, which in certain circumstances imposes a charge to duty on a slice of a company's assets commensurate with the benefits received by the deceased from the company during the last five years of his life. This omission was later, to some extent, remedied by the insertion into the Bill of what is now section 65. An adequate explanation of the new section would necessitate an exposition of the operation of section 46 of the Finance Act, 1940, and its related provisions, which is not possible here. Suffice it to say that section 65 provides for graduation of the charge to duty where the deceased has surrendered title to benefits from a company earlier than two years before his death.

Modification of the assets valuation of shares

Broadly speaking, shares of a company are valued for estate duty purposes by reference to the value of the underlying assets of the company (as opposed to the normal open market valuation of the shares), when the company is under the control of not more than five persons (within the extended meaning given to that expression by the Finance Act, 1940, section 58 (1)) and, the deceased had control of the company at any time during the five years ending with his death.[93] Hitherto, the assets valuation has tended to operate unfairly with regard to assets used in, or land and buildings occupied for the purposes of, a company's business. It has been proper to value such property on the basis of a sale in the open market without any restrictions as to subsequent user of the same being imposed, while the rest of the company's assets have been valued on the basis of a sale of the business as a going concern. Such method of valuation has led to highly artificial results. For

[88] Finance Act, 1949, s. 33 (1) and (2).
[89] Finance Act, 1957, s. 38 (11).
[90] Finance (1909–10) Act, 1910, s. 59 (2).
[91] Finance Act, 1960, s. 64 (5).
[92] Finance (1909–10) Act, 1910, s. 59 (1).
[93] Finance Act, 1940, s. 55 (1).

example, the shop premises of a company carrying on retail trade might be valued at the price that the same would fetch if sold for redevelopment, which would be higher than the value of the premises if they were still to be used for the company's business which, it would be assumed in order to value other assets of the company, would still be carried on.

This anomaly is now rectified by section 66 (1) which provides that the value of property used in a company's business shall be estimated for the purposes of an assets valuation of the company's shares, on the footing that the business is being sold where the property is subject to an enforceable restriction that it is to be used only for the purposes of the business. The new provision does not apply, in the case of a company whose main business is dealing in investments, land or buildings, in respect of any of such items belonging to such business at the time of the death in question.[94] Nor does the provision apply if its effect would be to reduce the value of the shares subject to the assets valuation below whichever is the lower of their open market value and their "assets value" estimated without regard to section 66 (1).[95]

Miscellaneous

Part V of the new Act begins with a section that is commendably brief and intelligible and which increases profits tax from 10 per cent. to 12½ per cent.[96] By sections 69 and 70 unit trusts are assimilated to the position of investment companies for the purpose of income tax and profits tax. Section 72 provides that for the year 1960–61 and subsequent years, capital allowances in respect of machinery and plant used in management will be available to life assurance companies, investment companies, savings banks and industrial and provident societies and owners of land or houses chargeable under Schedule A. Certain exceptions from income tax, estate duty and stamp duty are given by sections 73 and 74 in respect of members of N.A.T.O. serving in the United Kingdom.

Section 16 incorporates a new formula into section 486 of the Income Tax Act, 1952 (which limits to 5s. 6d. the exoneration from tax of a payee under a pre-war provision for a tax-free payment), so that the section will not require amendment each time the standard rate of income tax is changed. Section 39, which has retrospective effect, provides that the Income Tax Acts are to apply to public departments of the Crown, but not so as to render such departments liable for tax which ultimately would be borne by the Crown. This

[94] Finance Act, 1960, s. 66 (2).
[95] *Ibid.*, s. 66 (3).
[96] Finance Act, 1960, s. 67.

section was necessary in order to rectify the anomalous position revealed in *Whitworth Park Coal Co., Ltd.* v. *I. R. C.*,[97] namely that section 169 and 170 of the Income Tax Act, 1952, did not bind the Crown. A small amendment is made by section 41 in respect of reliefs for premiums on retirement annuities under section 23 (3) of The Finance Act, 1956. Section 42 confirms a further double taxation agreement with Eire, designed to ensure that tax exemptions can only be gained in either country subject to all the tax laws of that country. This deals with an anomaly which came to light in *I.R.C.* v. *Collco Dealings Ltd.*[98]

Finally, it remains to note that by section 77, premium bonds are made a slightly better gamble.

[97] [1959] 3 W.L.R. 842.
[98] [1960] 2 W.L.R. 848.

THE MODERN LAW OF AGRICULTURAL HOLDINGS—V

MISCELLANY-AT-LAW

By J. MUIR WATT, M.A., Barrister-at-Law

The last two articles of this series will inevitably have a somewhat more miscellaneous appearance than the earlier ones. This is because it is proposed to pick out additional points which are primarily of interest to lawyers. There are large sections of agricultural holdings law which are of greater day-to-day interest to tenant-right valuers and land agents than to lawyers. For example, the detailed application of the code of compensation for improvements and tenant-right is a matter of every-day practice for valuers. In applying this code they seldom require legal advice. They acquire an intimate and comprehensive knowledge of the relevant sections of the Agricultural Holdings Act, 1948, and the current compensation regulations, at present the Agriculture (Calculation of Value for Compensation) Regulations, 1959.[1] Although there are a few unsolved legal riddles in the sections in question, they do not appear to give rise to difficulties in practice, and it would therefore be unprofitable to take up space in *The Conveyancer* by expounding these sections at length.

Contracts of tenancy: tenancies for fixed terms

The draftsman must be fully acquainted with all the law relating to the creation of a contract of tenancy of agricultural land and, in particular, with the special statutory provisions which, in the case of agricultural holdings, impinge upon the common law operation of a tenancy for a fixed term as opposed to a periodic tenancy. In this connection the recent decision of the Court of Appeal (affirming Diplock J.) in the case of *Gladstone* v. *Bower* [2] is of great importance to the draftsman and is considered in detail below.

Since the machinery by which Parliament has given security of tenure to agricultural tenants is to enable them to reply to a notice to quit by serving a counter-notice,[3] the question immediately arises as to what provisions Parliament has made in cases where the

[1] S.I. 1959, No. 496.
[2] [1960] 1 Q.B. 170 (Diplock J.): [1960] 3 W.L.R. 575 (C.A.).
[3] See the first article in this series, *ante*, p. 29.

tenant's interest is a fixed term, which would normally expire by mere effluxion of time, thus not providing any opportunity for the machinery of a counter-notice to operate. The odd thing is that Parliament, as judicially interpreted, has dealt partially with this situation, but has failed to do a complete job. Tenancies for fixed terms might be divided for the present purpose into tenancies (1) for a fixed term of less than a year, (2) for one year certain, (3) for a fixed term of more than one but less than two years, (4) for a fixed term of two years or upwards. Parliament has made provision for cases (1), (2) and (4), but not for case (3). It may be said that this is not a matter of great practical importance, as short fixed terms are highly inconvenient for agricultural purposes and, consequently, the farming community would be unlikely to enter into them anyhow. There is some force in this, but any loophole in the arrangements for giving security of tenure is of some significance at a time when the pressure of demand for farms to rent is intense. In order to get into a farm at the present day potential tenants might be willing to agree to take a holding on a short fixed tenancy in the hope that it will be followed by another short fixed letting, and so on in a series, even if there is no legal guarantee that the series will continue. A landlord, on the other hand, might be perfectly willing to grant one short tenancy after another as long as he was assured that if the time came when he wished to resume possession he could do so without difficulty at the end of the then current term.

In view of this it is of interest to see what the position is in respect of each of the four categories of fixed tenancy mentioned above.

A fixed term for less than a year

A fixed term for less than a year is clearly caught by section 2 of the Agricultural Holdings Act, 1948, as it is " an interest less than a tenancy from year to year." The result is that unless the prior approval of the Minister of Agriculture has been obtained or the letting falls within the proviso to section 2 (1), the letting will take effect as if it were a letting from year to year. It is, of course, assumed that the land is let for use as " agricultural land," as defined by the 1948 Act,[4] and that it is not such that it would fail to qualify as an agricultural holding even if the tenancy were converted into a yearly tenancy. A letting for a fixed term of less than a year, being thus converted into a letting from year to year, requires

[4] See s. 1 (1), (2); s. 94 (1).

a notice to quit to determine it and consequently attracts the benefit of the security of tenure provisions of the Act.

Grazing or Mowing Lettings

One of the exceptions covered by the proviso to section 2 (1) is an agreement for the letting of land in contemplation of the use of the land only for grazing or mowing during some specified period of the year. Such a letting will expire by effluxion of time and attract no security of tenure. This exception, as judicially interpreted, has a fairly wide scope, but the purpose of the letting must be for grazing or mowing. Any period less than a full year may be specified, even 364 days,[5] as there is nothing to confine the expression to a shorter period or to one with particular agricultural significance, such as the recognised hay-making season or the summer or winter grazing. A series of separate lettings of three months at a time has been held to be within the exception where the new letting began immediately after the previous letting ended, even though the series lasted for a total of five years and both parties expected (but did not within the meaning of the proviso " contemplate ") that the lettings would in fact be renewed.[6] Further, it appears to be possible to hold over from one period of 364 days to another without necessarily creating an annual tenancy.[7]

364-Day Tenancies

It is somewhat paradoxical that the possibility of a 364-day tenancy should arise out of a section which was enacted for the very purpose of closing the loophole revealed in the previous legislation by the well-known 364-day case of *Land Settlement Association, Ltd.* v. *Carr.*[8] In that case the tenancy granted was " from October 1, 1939, to September 29, 1940, and thenceforward from September 30, 1940, for the term of 364 days and thereafter for successive periods of 364 days from September 29, 1941." It was held that the arrangement was not a " contract of tenancy " within the 1923 Act, and, accordingly, that the letting was not subject to any of the provisions of that Act. It must be observed that the possibility of a 364-day tenancy under the proviso to section 2 (1) of the 1948 Act, is a more restricted one than under the 1923 Act. It must be " in contemplation of the use of the land

[5] *Reid* v. *Dawson* [1955] 1 Q.B. 214; *Scene Estate, Ltd.* v. *Amos* [1957] 2 Q.B. 205.
[6] *Scene Estate, Ltd.* v. *Amos, supra.*
[7] *Reid* v. *Dawson, supra.*
[8] [1944] K.B. 657.

only for grazing or mowing," not in contemplation of general agricultural operations. Further, an express agreement for a series of 364-day periods, as in *Land Settlement Association, Ltd.* v. *Carr*,[8] does not appear to be permitted by the proviso to section 2 (1). In *Reid* v. *Dawson* the agreement was for one term only, commencing on November 1, 1950, and terminating on October 30, 1951. At the end of the 364 days no new tenancy was expressly granted but the tenant retained the use of the land in question and continued to pay the rent in half-yearly instalments. At the end of the second 364 days the landlord claimed possession and the tenant claimed the protection of section 2. It was held that the landlord was entitled to possession. The holding over after the expiry of the first 364 days was by implication for another 364 days and the tenancy was not transformed by the holding over into an annual one. The relevant part of the proviso to section 2 (1), however, only applies if the letting is for " some specified period of the year." Although this wording is satisfied where a letting for such a specified period, even if it is 364 days, is followed by another such letting, an agreement which creates *ab initio* a *periodic* tenancy, the period being 364 days, does not seem to be an agreement for letting for " some specified period of the year." Nor does an agreement providing *ab initio* for a limited number of 364-day terms. A series of separate, successive agreements, each for part of a year, each complete in itself and containing no option or obligation for renewal, seems to be the safest way to keep within the proviso and yet arrange what is in effect a continuous letting. Although in result such a letting is continuous, in form it is a discrete series of separate lettings, each for part of a year.

Approval by the Minister

A fixed term for less than a year is not converted by section 2 into a tenancy from year to year if the letting was approved by the Minister before the agreement was entered into. The function of approving was delegated by the Minister to County Agricultural Executive Committees[9] and is one of the functions which the Committees retain. It is an administrative, not a judicial function. Examples of cases where approval might be given are where land is known to be going out of agricultural use within a short period and it is desired to let it for agricultural use in the meantime, or where for some other reason there is a justification for temporary arrangements being made for the cultivation of the land.

[9] See the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948, No. 187).

Licences

A point which is of some academic, although not much practical, interest in connection with section 2 is that while in the case of tenancies its normal effect is to increase the immediate quantum of the interest, its effect in the case of licences might be to reduce the quantum, although to increase the quality, of the interest. This is because where the section operates on a licence its effect is to transform the licence into a tenancy from year to year, whatever the duration of the licence. Thus a licence for twenty-one years (which is conceivable, if unlikely to be encountered often in practice) would be converted into a tenancy from year to year, a gain in quality but a technical loss in quantity, although this loss may be apparent rather than real when the effect of security of tenure is taken into account.

A term for one year certain

It seems reasonably clear that a tenancy for one year certain is at common law an interest less than a tenancy from year to year, as the latter is a tenancy for a year certain plus at least the possibility of enduring longer.[10] It is true that at common law, and even in certain cases under the Agricultural Holdings Act, 1948, a tenancy from year to year may be determined at the end of the first year, but when the interest is created it appears to be a greater interest than an interest for one year certain because, unless lawfully determined, it will continue beyond one year. Therefore, section 2 will catch a term for a year certain and, subject to the conditions and qualifications of the section, convert it into a tenancy from year to year.

A term for more than one but less than two years

What is the position where there is a fixed term for more than one but less than two years? Is such a term caught by section 2? If not, is the result that it is a tenancy of an agricultural holding but one which, owing to a strange lacuna in the security of tenure provisions of the Act, terminates by effluxion of time, or is the result that it is outside the Act altogether on the ground that it is not a term of years at all? Until recently there was no authority on this point, although the writers of textbooks had put forward various opinions. The matter has, however, now been the subject of a

[10] See *per* Denning L.J. in *Reid* v. *Dawson* [1955] 1 Q.B. 214 at 218; *cf.* also the dissenting judgment of Deasy B. in the Irish case of *Wright* v. *Tracey* (1873) 8 Ir.R.C.L. 478; *Cobb* v. *Stokes* (1807) 8 East 358; *Oxley* v. *James* (1844) 13 M. & W. 210; and the undelivered judgment in *Gandy* v. *Jubber* (1865) 9 B. & S. 15, 17, 18.

decision by the Court of Appeal, in the case of *Gladstone* v. *Bower*.[11] In this case a farm was let for a fixed term of eighteen months. At the expiry of this term the landlord claimed possession, but the tenant contended that, as a result of section 2, the agreement took effect as an agreement for letting for a tenancy from year to year. The Court of Appeal, affirming the decision of Diplock J., have held that a tenancy for a fixed term of eighteen months (the reasoning applies to any fixed term of more than one but less than two years) is not an interest less than a tenancy from year to year and so is not affected by section 2 of the Act. Such a tenancy, therefore, expires by effluxion of time and does not attract the security of tenure provisions of the Act. The court also held, however, although the matter was not, apparently, the subject of much argument or discussion, that the tenancy in question was a tenancy for a " term of years " and that the land in question was, therefore, an agricultural holding in view of the definition of a " contract of tenancy " in section 94 (1). Both points deserve some further comment.

It is submitted that, in holding that a tenancy for a fixed term of more than one but less than two years is not an interest less than a tenancy from year to year, the court arrived at the correct conclusion. At common law a tenancy from year to year can be determined at the end of the first year. It is true that as a result of section 23 of the Agricultural Holdings Act, 1948, re-enacting earlier legislation, many agricultural tenancies cannot be determined earlier than the end of the second year. There are, however, some not unimportant cases where, as a result of the proviso to section 23 (1), agricultural tenancies can be determined at the end of the first year, and, in any case, when the draftsman used the expression " less than a tenancy from year to year " it seems probable that he had in mind the common law conception of a tenancy from year to year as affording a fixed and invariable basis for quantitative comparison.

Can a term of less than two years be a " term of years " ?

It is, however, submitted with respect that the correctness of the decision that the tenancy in question was a tenancy for a " term of years," with the consequence that the land was an agricultural holding, and thus within the 1948 Act for all such purposes as compensation for improvements, tenant-right and so on, is not quite so clear.

Before considering the arguments it is worth noting what the result would be if it were held that such a tenancy is not for a term

[11] See [1960] 3 W.L.R. 575. For the decision of Diplock J., see [1960] 1 Q.B. 170.

of years. It would mean that, the land not being an agricultural holding, Part II of the Landlord and Tenant Act, 1954, would not be excluded. The tenancy would, therefore, be able to qualify, subject to the fulfilment of the relevant conditions, for protection as a business tenancy under the 1954 Act. (Neither section 43 (1) (*a*) of the 1954 Act, as originally enacted, nor the amendment made to that paragraph by paragraph 29 of the First Schedule to the Agriculture Act, 1958, excludes from the protection of Part II of the 1954 Act, the case of a tenancy which is not a tenancy of an agricultural holding because it is a tenancy for a fixed term of more than one but less than two years). The odd thing is that if the court in such circumstances granted the tenant a new tenancy under Part II of the 1954 Act, it would, unless the court restricted the new tenancy to a fixed term of more than one but less than two years, be a tenancy of an agricultural holding and thus withdrawn from any further application of the 1954 Act.

The main argument in favour of the view that a term of more than one but less than two years is a "term of years" within the meaning of section 94 (1) of the 1948 Act, is derived from the language of section 3 (1) of the Act. This provides that a tenancy of an agricultural holding "for a term of two years or upwards" shall continue as a tenancy from year to year instead of expiring by effluxion of time, unless terminated by notice in accordance with the subsection. It is argued that this wording implies that a term of less than two years is a term of years for the purpose of the Act. If a term of less than two years is not a term of years, it would have been unnecessary to say "for a term of two years or upwards"; it would have been sufficient to say "for a term of years."

Against this, there is the fact that two of the Lords Justices in *Land Settlement Association, Ltd.* v. *Carr*, in spite of the wording of section 23 (1) of the 1923 Act, which is virtually identical with that of section 3 (1) of the 1948 Act on this point, went out of their way to approve the proposition, for which the *Bishop of Bath's Case* is cited,[12] that nothing less than two years can be a term of years. Thus Scott L.J. said: "In the *Bishop of Bath's Case* it was made clear that no time shorter than two years could constitute a 'term of years.'"[13] Luxmoore L.J. said: "This is a tenancy for two periods of 364 days certain and not for two years certain, and, therefore, cannot be described as for a term of years."[14]

Furthermore, the argument derived from section 3 (1) is not absolutely conclusive. Its force depends to some extent on what

[12] (1606) 6 Co.Rep. 34b.
[13] [1944] K.B. 657 at 662.
[14] *Ibid.*, 667.

point it is considered that Parliament wanted to emphasise. A tenancy for, say, eighteen months is on any view a tenancy for a "term," although not, on one view, for a "term of years." There seems to be nothing absurd in supposing that the draftsman in the opening words of section 3 (1) was concerned to make it clear that the provisions for extension of tenancies which he was about to formulate applied, not to all fixed terms, but only to fixed terms of two years or upwards, namely, the kind of terms which, according to correct common law usage, are properly called "terms of years."

Whatever view one finally adopts, the argument that a term of more than one but less than two years is not a term of years seems to deserve more attention than it received in *Gladstone* v. *Bower*. Unfortunately, as both parties accepted the contrary view, the Court of Appeal were not asked to consider the correctness of the doctrine which commended itself to their predecessors in 1944. The latter may have been wrong but their error, if any, deserved discussion.

A term of two years and upwards

Little more need be said about tenancies within this category. Section 3 of the 1948 Act, ensures that they do not expire by mere effluxion of time so as to deprive the tenant of the possibility of security of tenure. They can only be determined by a notice to quit or by a notice which is deemed, for the purposes of the Act, to be a notice to quit, and the tenant may, accordingly, serve a counter-notice under section 24 (1), subject, of course, to section 24 (2).

A gap in the Act

The decision in *Gladstone* v. *Bower* shows that there is a hole in the security of tenure provisions of the 1948 Act. Indeed, one of the tenant's arguments in the case was that a decision against her would indicate a curious defect in the system of security of tenure, and that a construction which would avoid such a result was to be preferred. Both Diplock J. and the Court of Appeal, however, were prepared to acknowledge the existence of a *casus omissus* in the Act, and they were not prepared to usurp the law-making function of Parliament by supplying the remedy. No doubt the question whether amending legislation is required is receiving consideration in the right quarter, but a decision may be postponed, pending the result of a possible appeal to the House of Lords.

Death of tenant during currency of a term of years

A somewhat anomalous state of affairs arises when a tenant dies at least two years and three months before the date fixed for expiry of a term of years. Section 3 (1) provides that a tenancy for a term of two years or upwards shall, instead of expiring by effluxion of time, continue as a tenancy from year to year unless, not less than one year nor more than two years before the date fixed for the expiration of the term, a written notice has been given by either party to the other of his intention to terminate the tenancy. Such a notice is deemed, for the purposes of the Act, to be a notice to quit. Thus a notice to terminate the tenancy at the end of the fixed term cannot be given more than two years before the date of expiry. If, however, the landlord is to take advantage of section 24 (2) (*g*) upon the death of a tenant, the notice to quit must be served within three months of the date of death. Hence, to take an example, if a tenant dies when there are still three years unexpired of, say, a seven-year term, the landlord cannot make use of section 24 (2) (*g*) to serve a notice to quit on the personal representatives within three months of the death, with a view to obtaining possession on the expiry of the term without being met by a claim for security of tenure. A notice given early enough to satisfy section 24 (2) (*g*) is too early to satisfy section 3 (1), and a notice given at the earliest time allowed by section 3 (1) is too late to satisfy section 24 (2) (*g*). It seems very doubtful whether Parliament envisaged and approved this result. The point is one to which the attention of a landlord who is considering the grant of a term of years to a tenant in whom personally he has confidence, but in whose successor on death he might not have the same confidence, should be directed.

Fresh light on "sound management"

In the second article of this series the amendments made by the Agriculture Act, 1958, in section 25 (1) of the 1948 Act, were discussed.[15] The new paragraph (*b*) of the substituted subsection provides, as one of the grounds for an application for consent, "that the carrying out thereof [*i.e., the purpose for which the landlord proposes to terminate the tenancy*] is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes." It was pointed out in the article above mentioned that it was important for the Agricultural Land Tribunal to keep distinct the two issues (a) whether the landlord has established one of the grounds for

[15] See *ante*, pp. 133–139.

consent specified in section 25 (1), and (*b*) whether the "fair and reasonable landlord" proviso applies.[16] The recent case of *Evans* v. *Roper*[17] in the Divisional Court has both afforded some guidance on the interpretation of "sound management" and has emphasised the importance of keeping these two issues quite separate.

In *Evans* v. *Roper*, the landlord was the owner of a substantial estate including two farms which, for the present purpose, may be referred to as the A farm and the B farm. The landlord considered that the B farm was not in its existing state an efficient farming unit and that it was desirable, in the interests of the estate as a whole, to detach some fifty-four acres from the A farm and add them to the B farm. Accordingly the landlord gave the tenant of the A farm notice to quit the fifty-four acres in question and applied in due course to the Tribunal for their consent under section 25 (1) (*b*). The Tribunal refused their consent. One of their reasons for doing so was that to take away from the tenant of the A farm the fifty-four acres in question, which included some of his best land and a cottage, might well adversely affect his farming and the production from and state of the fifty-four acres. Another reason given was that it was not proved that the B farm even as enlarged by the addition of the fifty-four acres would be a sound economic proposition. The Tribunal, having come to the conclusion that the landlord had not established the ground required by paragraph (*b*) of section 25 (1), did not apply their minds to the possible application of the "fair and reasonable landlord" proviso. The Tribunal subsequently stated a case for the decision of the Divisional Court of the Queen's Bench Division under section 6 of the Agriculture (Miscellaneous Provisions) Act, 1954. Students of the decision should be warned that on a first reading of the reports there is a risk of a little confusion, both because the actual questions formulated by the Tribunal for the court do not bring out the true issues of law involved,[18] and because the sentence in the judgment of Lord Parker C.J. which reads "The other question posed for the court is whether the tribunal were entitled to take into consideration the effect on the farming of the remainder of the land of the tenant from whom the fifty-four acres in question were proposed to be transferred," should clearly read "The other question posed for the court is whether the tribunal were entitled to take into consideration

[16] *ante*, p. 135.

[17] [1960] 1 W.L.R. 814. See also [1960] 2 All E.R. 507. Neither report is perfect.

[18] The court, however, corrected this defect by reading the questions in the light of the reasons given by the Tribunal.

the effect that the transfer might have on the production from and state of the land so to be transferred." [19]

The decision in *Evans* v. *Roper* may be expressed as follows. In considering whether the landlord had established the ground set out in section 25 (1) (*b*), the Tribunal were entitled to take into account the effect of the landlord's proposal to transfer the fifty-four acres upon the whole estate, including the A farm, the B farm, the fifty-four acres in dispute considered as part of the estate, and indeed any other part of the estate. The Tribunal were not, however, entitled in determining this issue to take into account the effect of the proposed transfer upon the personal farming fortunes of the tenant of the A farm. The fact that the tenant personally might suffer was irrelevant to the determination of the question whether the landlord had established the application of paragraph (*b*), although it might have been relevant to the consideration of whether the " fair and reasonable landlord " proviso applied.

The Tribunal had clearly taken into account the possible suffering of the tenant in deciding the issue of paragraph (*b*), and to that extent they had fallen into error. Since, however, their decision was also influenced by another reason, namely, that it had not been proved that farm B even as enlarged would be a sound economic unit, the case was remitted to them for further consideration with the court's direction as to what matters could be taken into account in considering the two distinct issues of the application of paragraph (*b*) and the application of the proviso.

Right to remove fixtures: a formidable requirement

A point to which surprisingly little attention has been directed, is the formidable nature of one of the conditions which a tenant has to fulfil in order to be able to exercise the right to remove fixtures conferred by section 13 (1) of the 1948 Act. Section 13 (2) provides that the right conferred by section 13 (1) is not to be exercisable unless the tenant " has paid all rent owing by him and has performed or satisfied all other his obligations to the landlord in respect of the holding." This involves, *inter alia*, the full discharge of all repairing obligations, subject, no doubt, to the operation of the maxim *de minimis non curat lex*. It is a

[19] This is clear from the context. The L.C.J. had *already* dealt with the question which he formulates in this sentence—*i.e.*, question (b) in the statement of the two questions by the Tribunal. He is now going on to deal with question (a). See p. 818 of the W.L.R. and p. 510 of the All E.R. As both reports agree on the formulation it looks as if the statement is *per incuriam*. In the W.L.R. however, a new paragraph should begin with " Accordingly, I have come to the conclusion." In the All E.R. the words " the production on the estate of the fifty-four acres," should, it seems, read " the production from, and state of, the fifty-four acres."

well-known fact that there are very few farms where the tenant has at any given time fulfilled all his repairing obligations. There must be very numerous cases where, at the date when the question of removing fixtures arises, there are accrued dilapidations which, although not necessarily very serious, are well beyond *de minimis*. The tenant in such cases may be quite ready and willing to make a monetary payment in respect of the dilapidations, the amount to be settled between his valuer and the landlord's valuer or to be determined by arbitration. What section 13 (2) says, however, is not that the tenant is to be ready to pay for his dilapidations in due course, but that at the time he seeks to exercise the right of removal he has performed or satisfied all his obligations. This means that, so far as maintenance and repair are concerned, he has actually carried out all the maintenance and repair for which he is legally responsible. In cases where the " model clauses " contained in the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948, are incorporated in the contract of tenancy, he must have fulfilled all the tenant's obligations specified in the Schedule to the Regulations.

As section 13 makes a statutory exception to the common law rule *quicquid plantatur solo, solo cedit*, the result of the failure of the tenant to fulfil the condition for the exercise of his statutory right laid down in section 13 (2) (*a*) is that the landlord is restored to his common law rights and after the end of the two months' period prescribed by section 13 the tenant's right to remove fixtures will have irrevocably gone.

An extra-statutory concession

The tenant who for this reason loses the right to remove fixtures affixed by him during the tenancy remains, or course, legally liable for the dilapidations the existence of which caused the loss of his right of removal. Although this is the strict legal position it seems that in some parts of the country it has been the practice to set-off against the dilapidations claimed by the landlord the value of the fixtures so retained by him. The origin of this concession is obscure, but it is possible that it may have originated from the rather doubtful legal position which obtained under the 1883 and 1923 Acts. Under these Acts it was provided that the fixture became the property of the tenant without any express qualification restricting the subsistence of the proprietary right to the period within which the right of removal could be exercised, which was " before or within a reasonable time after the termination of the tenancy." It was at least arguable that the fixture remained the property of the

tenant even after he ceased to have a right to remove it, although one school of thought held that the landlord's common law rights revived as soon as the reasonable time had expired.[20] It is perhaps not surprising that in the context of this ambiguous legal situation the practice mentioned above came into being. There is not the same justification for it today and it may in fact have dwindled, but hints of it are still heard.

A practical difficulty

Before leaving this subject one practical difficulty may be mentioned. There may be a dispute between the landlord and the tenant as to whether the latter is in breach of obligations under his tenancy and thus precluded from removing the fixtures. In the normal way the question of dilapidations is, failing agreement, settled by an arbitrator as one of the matters to be determined in an arbitration under the 1948 Act, at the end of the tenancy. The difficulty is that the two months allowed by section 13 (1) would almost certainly have expired before the arbitrator had determined the liability, if any, for dilapidations. The alternative is court proceedings. Here again, however, there might be a difficulty about getting the matter decided in time and there is the further difficulty in the way of obtaining a declaration in the county court unless ancillary to other relief. Again, an action for damages for dilapidations can be brought in the courts during the currency of the tenancy, but the landlord's remedy at the end of the tenancy is arbitration only.[21] It is at the end of the tenancy, as a rule, that the tenant wishes to exercise any right he may have to remove a fixture and the question which requires decision is whether at that point of time he has or has not fulfilled all his obligations under the tenancy. It may be that the present statutory provisions require to be reconsidered with this practical difficulty in mind.

Surrender agreements: more traps for draftsmen

The drafting of an agreement for the surrender of a tenancy of an agricultural holding may not appear to raise many problems, but there are at least two rather unexpected points which arise.

How not to draft a void agreement

The first point concerns the impact of section 65 (1) of the 1948 Act. It might be thought that it would be convenient to embody in

[20] *Cf.*, A. J. Spencer's *Agricultural Holdings Act, 1923*, 8th ed., p. 83, and Lely and Aggs' *Agricultural Holdings*, 5th ed., p. 107.
[21] See *ante*, p. 299.

the surrender agreement some special provisions in regard to compensation on the termination of the tenancy. Section 65 (1), however provides that " save as expressly provided in this Act, in any case for which apart from this section the provisions of this Act provide for compensation, a tenant or landlord shall be entitled to compensation in accordance with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary." This provision is sufficient to invalidate a surrender agreement which provides for compensation on the termination of the tenancy otherwise than in accordance with the compensation provisions of the Act. It should be mentioned here that a surrender, if a proper legal act of the parties as distinct from a mere abandonment of possession by the tenant, is within the definition of " termination " in section 94 (1),[22] so that it cannot be contended successfully that a surrender is something which transcends the provisions relating to compensation on the termination of the tenancy. A surrender agreement should not, therefore, contain compensation provisions which differ from those in the Act. It is probably better that the surrender agreement should not deal with compensation at all. Once the tenancy has been terminated by surrender, however, there is nothing to prevent the parties from entering into an agreement by which the rights to compensation given by the Act are quantified or by which any doubtful claims are compromised.

Notice of intention to claim

The second point concerns the provisions of section 70 (2) in regard to notice of intention to claim. It might at first sight seem very odd if a claim arising out of the surrender agreement is not enforceable unless a notice of intention to claim is served before the expiration of two months from the effective surrender of the tenancy. Yet the word " agreement " in section 70 (1) would cover a surrender agreement. However, the procedure is only odd if the rights to compensation are derived directly from the surrender agreement, and, as has been mentioned above, section 65 (1) would invalidate any compensation clauses in the agreement which are not in accordance with the Act. If the surrender agreement is silent in regard to compensation, any claim for compensation will be derived from the Act and there is nothing particularly odd about having to give notice of intention to claim compensation under the Act, before the expiration of two months from the termination of the tenancy by surrender. It is possible, however, that the surrender agreement

[22] This was assumed in *Frankland* v. *Capstick* [1959] 1 W.L.R. 205; *Cf.* also s. 99 of the Act.

may merely provide that the parties shall receive compensation in accordance with the Act. The effect of this may be that the claims to compensation arise formally under the surrender agreement and not under the Act, but if so, the surrender agreement merely echoes the Act and there would be nothing odd about notice of intention to claim having to be given in accordance with the Act. The moral is that a notice of intention to claim should be served even if it appears to be odd.

Notice of intention to claim: one or two notices?

There are three cases under the 1948 Act where a notice of intention to claim compensation has to be given not less than one month before the termination of the tenancy. These are (1) a notice of intention to claim more than the minimum amount of compensation for disturbance (section 34 (2), proviso (*c*)); (2) a notice of intention to claim compensation for " high farming " (section 56 (1), proviso (*i*)); (3) a notice by the landlord of intention to claim compensation for general deterioration of the holding (section 58). There is, however, a general provision in section 70 (2) that none of the kinds of claims mentioned in section 70 (1) (which include the three referred to above) shall be enforceable " unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim." The question arises whether in the three special cases where a notice of intention has to be served not less than a month before the termination of the tenancy a separate notice of intention has to be served " before the expiration of two months from the termination of the tenancy."

As a matter of construction the word " from " in the phrase " before the expiration of two months from the expiration of the tenancy " means " after." But a notice given not less than a month before the termination of a tenancy is necessarily given *before* the expiration of two months after the termination of the tenancy. It is, indeed, given at least three months before such expiration. It may be argued, however, that the notice referred to in section 70 (2) must be given after the termination of the tenancy but before the expiration of two months after. It is difficult to accept this reading. " Before the expiration of two months from the termination of the tenancy " means " before the expiration of a period which expires two months after the termination of the tenancy." It is not laid down how much or how little before such expiration the notice must be served. If Parliament had meant that this notice had to be served after the termination of the

tenancy but not later than two months after, the appropriate wording would have been " within two months from the termination of the tenancy."

It seems, then, as a matter of construction that a notice of intention to claim served not less than a month before the termination of the tenancy, under section 34 (2) proviso (*c*), section 56 (1) proviso (*i*), or section 58, would also satisfy section 70 (2). Further, the serving of two notices would seem to be purposeless duplication. *But* section 70 (2) is in quite general terms. It *could* be interpreted as requiring a notice of intention in addition to any notice served under these three special provisions and it is not certain what a court would decide if the question came before it. It is, therefore, only reasonable prudence in each of these three cases to serve two notices. In practice, the notice of intention under section 70 (2) will probably deal with a number of matters. It should, for safety, therefore, include any claim for which a notice has already been given under these three special provisions. Valuers sometimes express impatience when they are advised, *ex abundanti cautela*, to serve what appears to be in substance the same notice twice, but no lawyer in his senses will want to test the sufficiency of one notice at his client's expense.

RENTCHARGES IN REGISTERED CONVEYANCING—V

By Theodore B. F. Ruoff, Solicitor

(10) EXTINGUISHMENT OF RENTCHARGES

It is provided that:

" The Registrar shall, on proof to his satisfaction of—

(a) the determination of any . . . rentcharge . . . the title to which is registered under [the Land Registration] Act: or

(b) the discharge or determination (whole or partial) or variation of any . . . rentcharge . . . which is noted on the register as an incumbrance,

notify in the prescribed manner on the register the determination (whole or partial) or variation of such . . . interest." [1]

A rentcharge may be determined in a number of different ways and the evidence of extinguishment required by the Registry in respect of some of the commoner types of extinguishment will be set out hereafter, according to whether the title to the rentcharge is registered, or whether the charge is merely noted as in incumbrance against the title to the land.

Release

A rentowner may release his rentcharge to the owner of the land subject thereto,[2] but until August 12, 1859, a release of a part only of the land affected by a rentcharge operated to extinguish the rentcharge as to the whole,[3] although a part of the sum charged could be and can still be released.[4] After August 12, 1859, however, " a release from a rentcharge of part of the land charged therewith does not extinguish the whole rentcharge, but operates only to bar the right to recover any part of the rentcharge out of the land released, without prejudice to the rights of any persons interested in the land remaining unreleased, and not concurring in or confirming the release." [5]

1 Land Registration Act, 1925, s. 46.
2 Shep. Touch. (7th ed.) 340.
3 *Ibid.*, 345.
4 Co. Litt. 148a.
5 Law of Property Act, 1925, s. 70 (which substantially re-enacts the Law of Property Amendment Act, 1859, s. 10).

A rentcharge title may be closed (or, in the case of a partial release, the fact may be noted in the property register of the rentcharge title) [6] if the following are lodged at the Registry:

(1) The deed of release.
(2) A certified copy of it.
(3) The rentcharge certificate.
(4) The land certificate, if the title to the land is registered. The entry of the rentcharge as an incumbrance will be cancelled or modified as requisite.[7]
(5) The deed creating the rentcharge. This is needed for endorsement.
(6) A fee under scale 4 on the amount of the consideration moving from the landowner to the rentowner.[8]
(7) Application form A.4.

If the title to the rentcharge is not registered, the entry on the charges register of the title to the land may be cancelled, or may be modified by the making of a new entry, on lodgment of the documents mentioned in items (1), (2), (4), (5) and (7) above [9] and on payment of a fee under scale 1 on the consideration expressed to be paid for the release, either total or partial.[10] If the releasor is not the original rentowner, his title to the rentcharge must be deduced in accordance with customary conveyancing practice.[11]

"Merger" of Rentcharge

As mentioned in connection with first registration, if a rentcharge and the land subject thereto are both held by the same person, at the same time, in the same right, without any intervening estate, that person may treat the rentcharge as being extinguished,[12] and may apply for its determination to be notified on the register.[13] When the titles to both the land and the rentcharge are registered in the name of the applicant with an absolute title, the procedure is simple. There should be lodged at the Registry by post:

(1) An application by letter.
(2) The land certificate.
(3) The rentcharge certificate.
(4) The deed of grant or the duplicate of the conveyance which created the rentcharge.

[6] Land Registration Rules, 1925, r. 203.
[7] *Ibid.*
[8] Land Registration Fee Order, 1930, para. V (1).
[9] Land Registration Rules, 1925, r. 201.
[10] Land Registration Fee Order, 1930, para I.
[11] Land Registration Rules, 1925, r. 202.
[12] See p. 111, *ante*
[13] Land Registration Rules, 1925, r. 200.

(5) A fee of 10s. 0d.[14]

(6) Application form A.4.

On being satisfied that the rentcharge is extinguished, the Chief Land Registrar will cancel the entry of it as an incumbrance on the title to the land, and also cancel the rentcharge registration [15] and retain the rentcharge certificate. The deed creating the rentcharge will be marked to show the extinguishment of the charge.

If, in like circumstances, the title to the land is registered and that to the rentcharge is unregistered, the following documents and evidence are needed:

(1) An application based upon printed form 92 which relates to the merger of a lease.[16] No form has yet been specially devised by the Registry for this application, but the references to a lease or leasehold interest should be amended to refer to the rentcharge, in the manner illustrated by the precedent appearing hereafter.[17]

(2) The land certificate.

(3) The original deed of grant or the duplicate of the conveyance which created the rentcharge.

(4) All the deeds and documents of title (including marked abstracts and official certificates of search) in the applicant's possession which prove, in accordance with customary conveyancing practice, that the applicant (the registered proprietor of the land) is the owner of the rentcharge.[18] If the applicant is the original grantee, his grant or conveyance alone will be required.[19]

(5) A certified copy of the conveyance or other title deed by which the rentcharge devolved upon the applicant.

(6) A fee under scale 1[20] on the purchase price of the rentcharge, if it was recently bought by the applicant: otherwise a fee based upon twenty times its annual value.[21]

(7) Application form A.4.

The application is, in effect, an application for first registration of the rentcharge and the title is examined in the Registry upon that basis. On being satisfied that the rentcharge has become extinguished, the Chief Land Registrar will cancel the entry of the rentcharge as an incumbrance on the title to the land and mark the deed creating it in the manner previously indicated.

[14] Land Registration Fee Order, 1930, para. VIII.
[15] Land Registration Rules, 1925, r. 203.
[16] Obtainable from any branch of H.M. Stationery Office. See note 47 p. 17, *ante*.
[17] See Form 28, p. 753, *post*.
[18] Land Registration Rules, 1925, r. 202.
[19] *Ibid.*, r. 201.
[20] Land Registration Fee Order, 1930, para. I.
[21] *Ibid.*, Fee Order Rule 11 (*a*).

If, on the other hand, the title to the rentcharge that has become extinguished is registered, and the title to the land out of which it issues is not registered, the following should be lodged:

(1) An application by letter.
(2) The rentcharge certificate.
(3) The deed which created the rentcharge.
(4) Prima facie evidence that the applicant owns the land out of which the rentcharge issues. This might consist of production of the conveyance under which he acquired the land.
(5) A certified copy of the assurance of the land in his favour.
(6) A fee of 10s.[22]
(7) Application form A.4.

The application is completed by the Chief Land Registrar cancelling the registration of the rentcharge,[23] and, of course, cancelling also the rentcharge certificate, and marking the deed which created it to show that the title has been closed. The applicant will be given an office copy of the entries of that title which will state that it has been closed.

Redemption

The Minister of Agriculture, Fisheries and Food may, by a certificate under his seal,[24] certify that a rentcharge has been redeemed. Again, if any person who is interested in the whole or any part of the land affected by a rentcharge wishes to obtain a discharge of a part of the land, and the remainder of the land is not exonerated or indemnified from the rentcharge by means of a charge on the first-mentioned part, the Minister is empowered to apportion the rentcharge and any apportioned part of the rentcharge is redeemable similarly. On such redemption, the part of the land to which the redemption applies is discharged from the entire rentcharge.[25] Here too, the Minister issues a certificate. These certificates are final and conclusive and they absolutely free and discharge the land from the rentcharge,[26] subject, however, to a right to appeal to the High Court[27] or, when appropriate, the Court of Chancery of the County Palatine of Lancaster.

Briefly, the procedure for obtaining a certificate is as follows. When application is made to the Minister of Agriculture, Fisheries

[22] Land Registration Fee Order, para. VIII.
[23] Land Registration Rules, 1925, r. 203.
[24] Law of Property Act, 1925, s. 191 (8).
[25] *Ibid.*, s. 191 (7).
[26] *Ibid.*, s. 191 (5).
[27] *Ibid.*, s. 191 (10): see R.S.C., Ord. 54 D, r. 3.

and Food with a view to redeeming a rentcharge,[28] he will send to the applicant a draft certificate certifying the amount of money in consideration of which the rentcharge may be redeemed. The applicant is asked to supply a statutory declaration by the rentowner or his solicitor proving the nature and extent of the rentowner's estate and interest, the date and short particulars of the instrument under which his estate or interest is derived, the names and addresses of the trustees (if any) under such instrument, and particulars of the incumbrances (if any) affecting the rentcharge.[29] When the draft certificate of amount of redemption money has been approved and returned to the Minister with the statutory declaration, the certificate is engrossed and sealed by him [30] and sent to the applicant with a direction that he should pay over the redemption money to the rentowner and obtain his receipt, which must be endorsed on the certificate of amount of redemption money and signed over a 2d. stamp. On receipt of this document the Minister endorses on the certificate of amount of redemption money his certificate of redemption which is duly sealed. Ad valorem fees are payable.[31]

The Chief Land Registrar will act on such a certificate in order to close a rentcharge title or cancel the entry of a rentcharge as an incumbrance against the registered title of the corporeal land subject thereto. The application should be made by letter, enclosing the Minister's certificate, with an office copy or certified copy of it, accompanied by a written certificate by the applicant's solicitor that no appeal to the court has been made. If the title to the rentcharge is registered, the rentcharge certificate should be lodged. If the title to the land charged is registered, the land certificate should be lodged also. If the rentcharge is merely noted as an incumbrance against the land, the land certificate is needed. A fee is payable under scale 1 on twenty times the annual value of the rentcharge when the rentcharge is unregistered but is noted as an incumbrance against registered land.[32] When the rentcharge is registered, the fee for closing the title is 10s. 0d.[33]

In addition to the above procedure the court has a discretion to direct the discharge of an incumbrance on the occasion of a sale or exchange by the court or out of court of the land subject thereto.[34] The Chief Land Registrar will act on any order so made by the court

[28] Law of Property Act, 1925, s. 191 (1).
[29] Redemption of Rent Rules, 1930, (S.R. & O. 1930, No. 355), r. 5.
[30] As to which see the Board of Agriculture Act, 1889, s. 6 (2).
[31] Schedule of Fees in respect of Transactions under the Tithe Annuities Apportionment Act, 1921, etc. (S.R. & O. 1929, No. 584.)
[32] Land Registration Fee Order 1930, para. IX; and *cf.* Fee Order Rule 11 (*a*).
[33] *Ibid.*, para. VIII.
[34] Law of Property Act, 1925, s. 50. "Incumbrance" appears to include a rentcharge: see *ibid.*, s. 205 (1) (vii).

on production of an office copy of it[35] together with such other documents and fees as are appropriate, as described above.

Peaceable Re-entry under Absolute Power

Application may be made to rectify a registered freehold title on the ground that the registered estate has been determined by the exercise of an absolute power of re-entry out of court. The application may be made by a letter supported by full conveyancing evidence of the existence and proper exercise of the power. In a normal case the evidence and documents mentioned below should be lodged:

(1) Evidence of the actual terms in which the absolute power of re-entry was granted. Usually this will appear from a filed abstract, but if the abstract does not give the terms of the grant with sufficient detail, the original (or duplicate) deed will be called for (see also paragraph (5) below). If the power was granted before January 1, 1926, it seems that it ought to be shown to have been limited to the period allowed by the rule against perpetuities.[36] If the power was granted after December 31, 1925, it seems that it need not be so limited.[37]

(2) Evidence by the statutory declaration of the applicant that before re-entering he did those things which he ought to have done and describing the facts which (he claimed) amounted to a peaceable re-entry. In the case of a re-entry for non-payment of the rentcharge the applicant must establish either, that the deed granting the power does not require a formal demand to be made,[38] or, if it does, that the demand was made precisely in the manner required by the deed. In the case of re-entry for a breach of other covenants, the applicant must prove that proper notice specifying the particular breach requiring it to be remedied, and claiming compensation for it,[39] was served upon the terre

[35] Land Registration Rules, 1925, r. 302.

[36] *Dunn* v. *Flood* (1883) 25 Ch.D. 629 at p. 632; affirmed, (1885) 28 Ch.D. 586. But see *Re the Trustees of Hollis' Hospital & Hague's Contract* [1899] 2 Ch. 540. It should be pointed out that in Key and Elphinstone's *Precedents in Conveyancing* (15th ed.) Vol. 1, p. 811, para. 6, there is a statement that rights of re-entry "could never have offended the modern rule of perpetuity." The contrary view is held by Mr. H. C. Easton whose opinion as an expert on this subject may be regarded as authoritative. See *Easton on Rentcharges* (2nd ed.) by H. C. Easton, p. 26; also, 214 L.T., 330, 331.

[37] Law of Property Act, 1925, s. 4 (3) and s. 121 (6); Land Registration Act, 1925, s. 18 (2).

[38] *Doe* d. *Biass* v. *Horsley* (1834) 1 A. & E. 766.

[39] See the Law of Property Act, 1925, s. 146 (1), and, especially, the definition of "lease" in para. (*a*) of subs. (5) of that section.

tenant.[40] A copy of the notice should be exhibited to the declaration. It seems that once there has been a re-entry for breach of covenants, the terre tenant has no right of relief,[41] although in the case of non-payment he may apply for relief within six months.[42] If this view is correct, an application based upon re-entry for non-payment ought not to be made to the Registry until six months have elapsed since the date of the taking of possession by the rentowner. In either case the applicant should expressly declare that no application has been made to the court for relief.[43]

(3) The land certificate relating to the determined freehold estate, if the applicant has been able to obtain it.

(4) The rentcharge certificate, if the title to the rentcharge is registered.

(5) The deed of grant or the duplicate conveyance or other deed creating the rentcharge.

(6) A fee under scale 4 on the value of the freehold estate, which value should be certified by the applicant's solicitor.[44]

(7) Application form A.4.

When satisfied first, of the applicant's right to make the application and secondly, that no right of relief exists, the Chief Land Registrar will register the applicant as the proprietor of the land. If the land certificate has been lodged, it will be amended accordingly. If it is unobtainable, the applicant will be registered under a new title number and a new land certificate will be issued to him. If the title to the rentcharge is registered, the registration will be cancelled and, in any event, the deed creating the rentcharge will be officially marked to indicate that the rentcharge has determined.

Re-entry after Order of Court

If the rentowner has obtained possession of the land subject to the rentcharge by virtue of an order of a court of competent jurisdiction,[45] application may be made to the Registry by letter to amend the registered freehold title. It should be supported by the following evidence and documents:

40 As to service, see *ibid.*, s. 196.
41 *Rogers* v. *Rice* [1892] 2 Ch. 170.
42 *Howard* v. *Fanshaw* [1895] 2 Ch. 581.
43 Under the Law of Property Act, 1925, s. 146 (2) and (5) (*a*).
44 Land Registration Fee Order, 1930, para. V (4).
45 See the Land Registration Act, 1925, s. 138 (1), and the Law of Property Act, 1925, s. 203 (3).

(1) A certified copy of the writ. The issue of the writ operates as a re-entry,[46] or, at all events, as an irrevocable election to determine the rentcharge.[47]

(2) An office copy of the order for possession.[48]

(3) The position as regards relief, is far from clear. In practice, in the case of proceedings founded upon breach of covenant, it seems that an application for relief must be made during the proceedings,[49] which end on re-entry. In the case of non-payment, it seems that relief under the Law of Property Act must be sought during the proceedings,[50] although under the Common Law Procedure Act, 1852, relief is available at any time within six months after execution is executed.[51] This suggests that the application to amend the landowner's title ought to be postponed for six months. In any event, the applicant's solicitor is required to certify by letter that no application for relief has been made.

(4) Either an office copy of the sheriff's return proving the taking of possession, or a statutory declaration by the applicant proving the facts which (he claims) amount to his re-entry upon the land.

(5) The land certificate relating to the determined freehold estate, if obtainable.

(6) The rentcharge certificate, if the title to the rentcharge is registered.

(7) The deed creating the rentcharge, or its duplicate.

(8) A fee of 1s. 0d. per £100 or part thereof (maximum £2) on the value of the freehold estate,[52] which value must be certified by the applicant's solicitor.

(9) Application form A.4.

On receipt of these documents and proofs the Chief Land Registrar will register the rentowner as the proprietor of the land in the manner previously described in regard to a peaceable re-entry.[53]

Re-entry and Adverse Possession

It should, perhaps be recorded that if a re-entry is wrongly made in purported pursuance of an absolute right of re-entry, the person

[46] *Moore* v. *Ullcoats Mining Co.* [1908] 1 Ch. 575.
[47] *Grimwood* v. *Moss* (1872) L.R. 7 C.P. 360.
[48] *Cf.* the Land Registration Rules, 1925, r. 302.
[49] *Rogers* v. *Rice*, *supra*.
[50] Law of Property Act, 1925, s. 146 (2).
[51] Common Law Procedure Act, 1852, s. 210.
[52] Land Registration Fee Order, 1930, para. VI (6).
[53] See p. 381, *ante*.

entering will, in due course, obtain a title to the land by adverse possession. In sharp contrast, however, if an entry is made in pursuance of a right of entry for perception, it is not adverse, and so cannot be the foundation of a title by adverse possession.

Adverse Possession: Non-Payment

Before July 1, 1940,[54] the non-payment of a rentcharge for a period of 12 years unquestionably rendered the title to it statute-barred, whether or not any person was in possession of the land out of which it issued,[55] always assuming, of course, that no question of disability, acknowledgment, part payment, fraud, or the like, arose. Under the Limitation Act, 1939, the definition of "land" includes rentcharges [56] and Mr. H. C. Easton of counsel, whose views must be regarded with the respect which is due to an undoubted expert on the subject of rentcharges, has claimed that this definition, in conjunction with other provisions of the new Act, has resulted in an unexpected alteration of the law.[57] The section which deals with the statute-barring of an action to recover land provides as follows [58]:

> "(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession') and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.
>
> "(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.[59]

[54] Limitation Act, 1939, s. 34 (2).

[55] Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 3, 34; Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 1, 9.

[56] Limitation Act, 1939, s. 31 (1).

[57] See 215 L.T. 106.

[58] Limitation Act, 1939, s. 10.

[59] *Cf. The Trustees, Executors and Agency Co., Ltd., and Templeton* v. *Short* (1888) 13 App.Cas. 793, which decided *in relation to corporeal land* that when a squatter relinquishes possession to the rightful owner, the Statutes of Limitation cease to run.

" (3) For the purposes of this section—

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be deemed to be adverse possession of the rentcharge; . . ."

It is not always fair to paraphrase other people's arguments, but Mr. Easton's point is, in effect, that if the word " rentcharge " is read into the above provisions as requisite (" No right of action to recover a *rentcharge* shall be deemed to accrue unless *the land subject thereto* is in the possession of some person," etc.), the result is that non-payment of the rentcharge alone will not cause it to become statute-barred. The two requisites (he avers) are non-payment of the rentcharge plus adverse possession of the land out of which it issues. In passing, the notion that " land " can be translated at the whim of the reader as " rentcharge " or as " the land subject thereto " is a little difficult to swallow. Mr. Easton does, however, admit that something may turn upon the meaning of " possession." Because he concedes that, the present writer is emboldened to suggest that perhaps Mr. Easton may be wrong in his views, for " possession " is defined in the Act thus [60]:

" References in this Act to the possession of land shall, in the case of tithes and rentcharges, be construed as references to the receipt of the tithe or rent, and references to the date of dispossession or discontinuance of possession of land shall, in the case of rentcharges, be construed as references to the date of the last receipt of rent."

If, therefore, the terre tenant remains in possession of the land subject to a rentcharge without paying the rentowner anything or making any acknowledgment for the statutory period, he unquestionably acquires a title to the land free from the rentcharge. Moreover, if the land out of which the rentcharge issues was (for example) made a derelict site by enemy bombing, so that neither the terre tenant nor anyone else is in possession of it, it seems to the present writer that, by virtue of the definitions of possession and dispossession quoted above, the rentowner would be statute-barred after the statutory period has passed, with the result that the terre tenant would thenceforth hold the land free from the rentcharge.

Adverse Possession: Wrong Payment

Payment may be made by or to a wrong person. If, for example, a squatter on land which is subject to a rentcharge unfailingly pays the rentcharge as and when and to whom it is due, it

[60] Limitation Act, 1939, s. 31 (6).

seems that he will in due course acquire a title by adverse possession to the land,[61] but will yet hold it subject to the rentcharge, for the simple reason that, there having been no discontinuance in payment, no right of action has at any time accrued to the rentowner in respect of arrears of the rentcharge.[62] Contrariwise, if the terre tenant, without challenge from the rentowner, mistakenly pays the rentcharge for the statutory period to someone other than the rentowner, it seems that that person may acquire a title to the rentcharge which is good against the rentowner under the documentary title.[63]

The Period

No action may be brought, in any of these cases, to recover land or a rentcharge after the expiration of twelve years from the date on which the right of action accrued to him or to his predecessor through whom he claims.[64] In the case of a rentcharge the right of action accrues, not on the date when the rentowner has a right to receive payment, but on the date when he actually last received a payment,[65] with the curious result that a rentcharge which is payable yearly may become statute-barred after eleven years.

Application of Limitation Act to Registered Property

The Limitation Act, 1939, applies to registered land in the same manner and to the same extent as it applies to unregistered land, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, it is not extinguished but is deemed to be held by the proprietor in trust for the person who has acquired title against the proprietor.[66] Any person who claims to have acquired a title under the Limitation Act to a registered estate may apply to be registered as proprietor of that estate.[67]

In a case where an applicant claims to have acquired a title to a rentcharge (as distinct from a claim that a rentcharge has been extinguished), the Chief Land Registrar, on being satisfied as to the applicant's title, is required to enter the applicant as proprietor either with an absolute, a qualified, or a possessory title (as the case may require), but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Act. This registration has the

61 Limitation Act, 1939, s. 4 (3).
62 *Ibid.* See also *Adnam* v. *Sandwich* (*Earl*) (1877) 2 Q.B.D. 485.
63 Limitation Act, 1939, ss. 10, 31 (6).
64 *Ibid.*, s. 4 (3).
65 *Owen* v. *De Beauvoir* (1847) 16 M. & W. 547: Limitation Act, 1939, s. 31 (6).
66 Land Registration Act, 1925, s. 75 (1).
67 *Ibid.*, s. 75 (2).

same effect as a first registration, but the ousted proprietor or the applicant or any other interested person may apply to the High Court,[68] or, when it has jurisdiction, the Court of Chancery of the County Palatine of Lancaster,[69] for the determination of any question that may arise.[70]

The Application

When a registered proprietor of land claims that a rentcharge to which his land is subject has become extinguished by virtue of adverse possession, his solicitor should lodge at the Registry:

(1) An application, by letter, for rectification of the register.
(2) A fully factual statutory declaration by the landowner which proves in detail all the material facts upon which he relies.
(3) His land certificate.
(4) The rentcharge certificate, if he can procure it, assuming that the rentcharge is registered.
(5) A fee under scale 4[71] on twenty times the annual value of the rentcharge.
(6) Application form A.4.

Other applications founded under the Limitation Act should be made similarly, but so that the evidence and documents lodged accord with the particular facts of the case. For example, if a person claims to have acquired a title to a registered rentcharge by adverse possession he may apply to be registered himself. The application should take the form of an application for first registration[72] and should be supported by the best available evidence, given by statutory declaration. A fee under scale 1 is payable as for a normal application for first registration on twenty times the annual value of the rentcharge.[73] As the registration of the title of the applicant does not spring from the registered title of the ousted proprietor, the title which is granted in pursuance of the application will not necessarily be of the same class as that previously registered.

Partial Extinguishment in Consequence of War Damage

Under the War Damage Act, 1943,[74] when a rentcharge issued out of land in respect of which a value payment for war damage was made, the rentowner was given the right of receiving part of the value payment, and if he did so his rentcharge was extinguished proportionally, that is to say, its amount was reduced. A similar

[68] Under the R.S.C., Ord. 55, r. 14A.
[69] Land Registration Act, 1925, s. 138 (1); Land Registration Rules, 1956, r. 1.
[70] Land Registration Act, 1925, s. 75 (3).
[71] Land Registration Fee Order, 1930, para. V (4).
[72] Form 1 G (as to which, see p. 17, *ante*) should be suitably modified.
[73] Land Registration Fee Order, 1930, para. I: Fee Order Rule 11 (*a*).
[74] War Damage Act, 1943, s. 25.

provision was made by the Town and Country Planning Act, 1947.[75] When registering the title to a rentcharge, or a title to land subject to a rentcharge, where there has been such an extinguishment, the Registry should be supplied with evidence of the making of a value payment (or a payment under the Town and Country Planning Act) to the rentowner and also evidence of the amount by which the rentcharge (or an apportioned part of it) was extinguished. In the case of a registered rentcharge an extinguishment of this kind is ineffectual until it has been notified on the register.[76]

When registering the title to a partially extinguished rentcharge the description of the rentcharge and the charged land in the property register will be followed by a note in terms such as these:

Note: By virtue of the provisions of the War Damage Act, 1943 [and the Town and Country Planning Act, 1947] the registered rentcharge was extinguished to the extent of £—— so that the annual amount thereof is now £——.

If the rentcharge had been informally apportioned before being extinguished proportionally, the register will contain a note (say, Note 1 on the property register) relating to the informal apportionment and this will be followed by a further note stating:

Note 2: By virtue of the provisions of the War Damage Act, 1943 [and the Town and Country Planning Act, 1947] the sum of £—— being the informally apportioned part of the registered rentcharge (referred to in Note 1 above) was extinguished to the extent of £—— so that the annual amount of the apportioned part is now £——.

When a rentcharge which has been extinguished proportionally is noted as an incumbrance against the title of the land subject thereto, similar notes will be added, as appropriate, to the entry in the charges register. In complicated cases, if all the original informal apportionments of a rentcharge, the reductions of them effected under the War Damage Act, and those subsequently made under the Town and Country Planning Act, were to be set out on the register in detail, the entries would inevitably be both lengthy and difficult to understand. The landowner and his legal advisers are primarily interested in knowing his present net liability in such a case, and the following example contains in tabloid form all the information that they will need. It will be observed that apportionments or exonerations made after the date of the statutory reductions are dealt with in the normal way.

[75] Town and Country Planning Act, 1947, s. 59; 4th Sched., Part I; and the Planning Payments (War Damage) Regulations, 1949.

[76] War Damage Act, 1943, s. 25 (5).

	C. CHARGES REGISTER Title P. 00089	Application No. and remarks
1.	The parts tinted pink, blue and yellow on the filed plan are subject to a perpetual yearly rentcharge of £40 created by a Deed of Grant dated 16 February 1909 and made between (1) Titus Titchborne (2) Titus Titchborne and Cyril Connolly and (3) Phillip Peachy. *Note*: By the undermentioned conveyances the said rentcharge was informally apportioned and by virtue of the provisions of the War Damage Act, 1943, and the Town and Country Planning Act, 1947, the informally apportioned sums were partially extinguished with the result that the following annual amounts became payable:	Duplicate issued with certificate: abstract filed.
	Conveyance informally apportioning rentcharge / *Land conveyed or affected* / *Reduced annual sum payable* 24 March 1926: (1) Leonard Luck. (2) Henrietta Hunt. — Tinted pink on filed plan. — £8 19s. 6d. 30 April 1926: (1) Leonard Luck. (2) Daniel Daintry. — Tinted blue on filed plan. — £6 10s. 9d. 3 May 1926: (1) Leonard Luck. (2) Oliver Odell. — Tinted yellow on filed plan. — £10 16s. 0d.	
2.	By a Conveyance dated 19 February 1960 made between (1) Bertie Beaumont and (2) Cecil Chowood the informally apportioned and reduced sums being part of the rentcharge of £40 (referred to in entry no. 1 above) payable in respect of the parts tinted pink, blue, and yellow on the filed plan were charged exclusively upon the land tinted pink on the said plan in equitable exoneration of the parts tinted blue and yellow thereon.	Duplicate issued with certificate: abstract filed.

Restrictive Covenants on Extinguishment of Rentcharge

Deeds creating rentcharges often contain, in addition to the positive covenants for the protection of the security, a number of restrictive covenants. If a rentcharge is released or otherwise extinguished, the positive covenants are at an end, but it does not follow that the restrictive covenants cease to bind the land. The restrictive covenants continue to be enforceable if they were

originally properly annexed to some benefiting land or if they were expressly assigned with land that benefited from them. If, however, as sometimes happens, the deed creating a rentcharge purported to annex restrictive covenants to the rentcharge, which is a process recognised neither in law nor equity,[77] the Registry will treat the restrictive covenants as at an end when the rentcharge ceases, although if there is any doubt whether the covenants were, or were not annexed to the rentcharge, the tendency will be to retain, rather than to cancel, notice of them.

Difficult Questions

It is apparent that difficult questions of law may arise in connection with some of the applications that have been mentioned, particularly those concerning re-entry and adverse possession. It is open to the Chief Land Registrar to refer such questions to one of the Conveyancing Counsel to the High Court,[78] or to some member of the Bar who is regarded as an expert in the particular branch of the law.[79] The applicant will be expected to defray any costs so incurred, but his consent to pay them will be obtained before anything is done.[80] Alternatively, the Chief Land Registrar may refer the matter for the decision of the High Court,[81] or state a case for its opinion.[82]

77 *Torbay Hotel Ltd.* v. *Jenkins* [1927] 2 Ch. 225, 239.
78 Land Registration Rules, 1925, rr. 26, 303.
79 *Ibid.* r. 304.
80 Land Registration Fee Order, 1930, Fee Order Rule 8.
81 Land Registration Rules, r. 298 (2).
82 Land Registration Act, 1925, s. 140.

THE CHARITIES ACT, 1960

By Spencer G. Maurice, Barrister-at-Law

It was in January 1950 that the Committee on the Law and Practice relating to Charitable Trusts, commonly called the Nathan Committee, was appointed. The report of the Committee was presented to Parliament in December 1952.[1] In July 1955 the government policy on charitable trusts in England and Wales was presented in the form of a White Paper.[2] Now, five years later, we have at last the long-awaited new statute, the Charities Act, 1960.[3] That the seed planted in 1950 should have taken so long to come to fruition should not be a matter for surprise or criticism. The task of bringing up to date the statute law relating to charitable trusts has clearly been a vast one: the lists of repeals in Schedules 5 and 7 to the Act provide a good indication of this. Although a non-political measure, the Bill did not have a particularly easy passage through Parliament, much of the criticism directed against it being prompted by fears that certain classes of charity would come under stricter departmental surveillance than before, when no good purpose was to be served by such control. It says much for the basic soundness of the Bill that the government spokesmen, both in the Lords and in the Commons, were so consistently able to justify its provisions, and gave way on so few points of importance. From the lawyer's point of view there is little to criticise in the Act: generally speaking, it is possessed of admirable clarity and, indeed, it is not going too far to hail it as a model of the parliamentary draftsman's art. Most welcome, of course, is the clearance from the statute book which it has effected: in particular, the body of statutes which have been referred to as the Charitable Trusts Acts, 1853 to 1939, has gone completely and the welter of provisions contained therein have, in so far as they were not obsolete (as many were), been streamlined into the present tidy Act. The new Act embodies almost the whole of the statute law apart from ecclesiastical law) relating to charitable trusts from the sixteenth century to the present day. In addition, it abolishes mortmain with considerable consequential simplification of the law.

Before embarking upon a consideration of the Act and hence

[1] 1952. Cmd. 8710.
[2] 1955. Cmd. 9538.
[3] 8 & 9 Eliz. 2, c. 58; hereinafter referred to as " the Act."

upon what it does, it is desirable to emphasise what it does not do. The terms of reference of the Nathan Committee were " To consider and report on the changes in the law and practice (except as regards taxation) relating to charitable trusts in England and Wales which would be necessary to enable the maximum benefit to the community to be derived from them." The report of the committee did not go outside those terms of reference. The government did not in all respects accept the committee's recommendations but the government's proposals (now, with some modifications, given effect in the Act) were less far-reaching than those of the committee.

The law of charity in England and Wales has always rested primarily on judicial precedent. Indeed, as the Lord Chancellor, moving the second reading of the Bill in the House of Lords, pointed out,[4] it was the fact that charity law is founded less upon statute than upon the principles evolved over the centuries by courts of equity and embodied in case law that made the introduction of the reforms envisaged in the White Paper a matter of the greatest delicacy and complexity. It is true that it has long been the practice to look to the preamble to the Charitable Uses Act, 1601, to ascertain what purposes are charitable in law and that the judges have not felt it open to them to hold purposes charitable unless they could fairly be said to be within the spirit and intendment of the preamble: see, *e.g.*, the speech of Lord Simonds in *Williams' Trustees* v. *Inland Revenue Commissioners.*[5] In fact, however, what we find there is simply a catalogue of purposes which were, as long ago as 1601, considered charitable, and at no time has there been a statutory definition of purposes which are charitable, save for the very limited definition in section 1 of the Recreational Charities Act, 1958. There was pressure on the government to include a definition in the Act but, wisely, it was resisted.[5a] When the Bill was in committee in the Lords, the Lord Chancellor pointed out [6] that it was impossible to devise a statutory definition of charity without altering the law, and the serious consequences which any alteration of the law in this respect would have.

What is a charity?

So far from providing a definition, the Act does something which to many lawyers will seem strange: by repealing the Mortmain and Charitable Uses Act, 1888, it destroys the preamble to the Act of 1601, which had been preserved till now only by section 13 (2) of the

[4] *Hansard* (Lords), March 1, 1960, col. 564.
[5] [1947] A.C. 447, 455.
[5a] The definition of charitable purposes in s. 46 of the Act does not say what purposes are charitable.
[6] *Hansard* (Lords), March 21, 1960, cols. 17, 18.

Act of 1888. Doubtless the preamble was not strictly speaking necessary, but in practice lawyers referred to it, and its destruction means that, in the attempt to cut out as much dead wood as possible, a still-useful bough has fallen under the axe. The case for the preamble's repeal is that whether a purpose is charitable is to be ascertained by reference to the reported cases: thus it is provided in section 38 (4) that any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Act of 1601, or of the preamble to it, is to be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales. But lawyers will bear in mind the fact that the cases at which they must look have been decided with an eye on the preamble. This seems certain, that the repeal of the preamble has in no way extended the field of charitable trusts. As before, a trust will be charitable only if it is for the relief of poverty, the advancement of education, the promotion of religion, or within the fourth head of charity in Lord Macnaghten's classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*[7]; that is to say, other purposes beneficial to the community. In the past it has been the view that properly a charity could not fall within this residual class without being at the same time *ejusdem generis* with one of the purposes listed in the preamble to the Act of 1601—though it is true to say that the list in the preamble was sufficiently comprehensive to allow pretty well any purpose beneficial to the community to be within its spirit and intendment—while now the proper test would seem to be whether a purpose is at least analogous to one which has been held charitable by the court in some reported case.

To ascertain whether or not an institution is a charity, it is, then, no good looking at the Act. If the purposes of an institution are charitable and it is subject to the control of the High Court—which means in practice of the Chancery Division of the High Court—in the exercise of its jurisdiction with respect to charities, then the institution is a charity within the meaning of the Act: see section 45 (1). The corporate property of an ecclesiastical corporation (that is, any corporation of the Church of England, whether sole or aggregate) held for the spiritual purposes for which that corporation is established, is not by its nature subject to any trust, and the ordinary courts have no more jurisdiction over it than they have over the goods of private individuals. Such property is dealt with under ecclesiastical law in the ecclesiastical courts. Accordingly, such a corporation is, so far as such property is concerned,

[7] [1891] A.C. 531, 583.

excluded from the operation of the Act, but a corporation aggregate which has, in addition to its ecclesiastical purposes, other purposes which are not ecclesiastical, is a charity within the meaning of the Act in respect of such property as it may hold for those purposes: section 45 (2). Christ Church, Oxford, provides an example of an ecclesiastical corporation having purposes and property which are charitable in law. A trust of property for purposes for which the property has been consecrated is also outside the Act: section 45 (2). The Lord Chancellor made it quite clear, however, on the second reading of the Bill in the Lords,[8] that the exclusion of ecclesiastical corporations from the bill does not in any way derogate from their charitable status, so that ecclesiastical property which has been accepted (*e.g.*, for tax purposes) as charitable in the past will not be affected by its exclusion from the Act. Neither parochial church councils nor diocesan boards of finance are ecclesiastical corporations established for spiritual purposes, and they are accordingly within the Act, but it is proposed that both diocesan boards of finance and ordinary church funds, raised by collections and expendable from week to week during the year, should be dealt with by excepting regulations.[9] The corporate property of civil corporations, like that of ecclesiastical corporations, but unlike that of eleemosynary corporations, is outside the court's jurisdiction. The Universities of Oxford and Cambridge are civil corporations—though capable, of course, of holding property, other than their corporate property, upon trusts which are within the jurisdiction of the court—and this fact is recognised in the words " so far as they are charities " (*i.e.*, as defined in section 45 (1)) at the beginning of Schedule 2, which lists the exempt charities.

Exempt charities

An institution—an expression which includes any trust or undertaking: section 46—which is an exempt charity within section 45 and Schedule 2 is not subject to the supervisory and inquisitorial powers of the Charity Commissioners contained in the Act. The general law of charity—and hence the Act where it deals with the general law—is, however, applicable to exempt charities. They are subject to the jurisdiction of the court at the relation of the Attorney-General. Furthermore, they may apply to the court or the Commissioners for the exercise of enabling powers; *e.g.*, the power of the latter under section 23 to authorise dealings with charity property. Exempt charities (which were also exempt under the previous law) owe their exemption to the fact that Parliament,

[8] *Hansard* (Lords), March 1, 1960, col. 647.
[9] *Hansard* (Commons, Standing Committee A), July 5, 1960, cols. 387, 388, Joint Under-Secretary of State for the Home Department—(Mr. David Renton).

having been fully into the matter of their constitutions, has been satisfied that there exist satisfactory arrangements for carrying out the objects of their trusts and safeguarding their property, and that in the circumstances it would be superfluous to submit them to the control of the Commissioners.

The Universities of Oxford and Cambridge so far as they are charities (see above) provide examples of exempt charities. They have their own powers of legislation for dealing with and reforming their charitable trusts and those of their colleges. Such legislation is subject to the approval of the Privy Council and has to be laid on the tables of both Houses of Parliament. There is no power in the Privy Council to send the Universities to the Commissioners or to refuse to deal with a case. The procedure is that the university or college makes the amending statute, and there is no power to stop it, except by petition or prayer against the statute, either in the Privy Council or in Parliament.

On the other hand, not every trust is within the statute-making powers of the university or college concerned. For example, a college might be co-trustee with someone else, and it is doubtful whether in such a case the autonomous statute-making powers would apply. In such a borderline case it is desirable that it should be open to the university or college—as it is under the Act—to go to the Commissioners and to ask for an appropriate order to be made.

The Church Commissioners and any institution which is administered by them provide further examples of exempt charities. That does not mean, however, that charities of the Church of England are exempt generally from the Commissioners' jurisdiction. Those charities with which the Church Commissioners have nothing to do are within it. Parochial church councils and diocesan boards of finance have been referred to above. The Representative Body of the Welsh Church, which falls within paragraph (*a*) of Schedule 2, is in a sense of similar status to the Church Commissioners, because, when the Welsh Church was disestablished, Parliament provided that the duties and services of the Ecclesiastical Commissioners, the predecessors of the Church Commissioners, in relation to the Welsh Church should be taken over by the Representative Body, which accordingly has statutory duties, and is, therefore, like other statutory bodies, in a special position as regards exemption.

Taxation; investment

Income tax, estate duty and rating are outside the scope of the Act, just as they were outside the terms of reference of the Nathan Committee. Since the Act is concerned with charities in England

and Wales only, and the taxing and rating statutes apply to the United Kingdom as a whole, it is obvious that this is necessarily so. In fact, however, the Act is indirectly of great importance from the point of view of taxes and rates: because an institution registered under section 4 (2) is, by virtue of section 5 (1), conclusively presumed to be a charity as long as it is on the register and accordingly automatically qualifies for relief, whereas in the past every institution seeking the fiscal advantages of charitable status has had to satisfy the Commissioners of Inland Revenue or the local rating authority as the case might be, a task which has not always been easy to perform.

Nor is the Act concerned with the investment of charitable funds. While in some respects the considerations affecting the investment of such funds are different from those governing the investment of private trust funds—in particular in regard to extension of the permitted field of investment—basically the problem of the investment of trust funds, private or charitable, is a single one, and the government propose to tackle it as such. The common investment funds, for which statutory provision is made for the first time in section 22, are not new. The section merely gives statutory effect to a settled practice in the administration by the court and the central authorities (the Charity Commissioners and the Minister of Education) of charitable funds, but such a fund can be of much assistance to the trustees of small charities and it is well that their attention should be drawn by statute to the existence of such means of investment. The government intend to introduce legislation on trustee investment generally, early next session.[10]

Major reforms

While much of the Act consists of re-enactment, and some provisions which are new merely give statutory effect to existing practice, it must not be thought for a moment that this is primarily a consolidating measure. Far from it: the Act introduces important administrative reforms aimed at obtaining the maximum benefit out of the vast number of charities which are known to exist. Moving the second reading of the Bill in the House of Commons, the Home Secretary said of it that it made four major reforms directed to the social realities of today.[11] He enumerated these as being, first, the reconstitution of the Charity Commission; secondly, the establishment of a central register of charities; thirdly, the establishment of a statutory foundation for voluntary co-operation between charity

[10] *Hansard* (Lords), March 1, 1960, col. 564, Viscount Kilmuir, L.C.
[11] *Hansard* (Commons), April 28, 1960, cols. 411, 412.

and the statutory welfare services on a basis of equality and partnership; and, fourthly, extension of the *cy-près* doctrine so as to make it easier for charity to adjust itself to rapidly changing needs. The provisions giving effect to these reforms will be considered in the review of the Act which follows.

Part I—The Central Authorities

As before, there are two central authorities exercising jurisdiction over such charities as are not exempt from their jurisdiction by virtue of Schedule 2, or excepted from it for certain purposes (*e.g.* registration) by regulations made under the Act. Those two authorities are the Charity Commissioners for England and Wales (s. 1 and Schedule 1) and the Minister of Education (s. 2). Generally speaking, the two authorities have concurrent jurisdiction (s. 2 (1)) whereas under the old law their jurisdictions were mutually exclusive of one another.[12] Although there is concurrent jurisdiction, a division of responsibility between the Commissioners and the Minister may, and doubtless will, be made by Order in Council under s. 2 (2).

So far as the constitution of the Commissioners is concerned, the most important feature is that it is no longer necessary for all to be lawyers. Now only two need be (Schedule 1, para. 1 (2)), which means that when there are three Commissioners (the normal number, though there may be as many as five) one layman may be counted among their number. The introduction of lay Commissioners is consonant with the fact that the Commissioners have not only judicial but also administrative functions and also partly act in an advisory capacity. Formerly, the Commissioners were appointed by the Queen. Now they are appointed by the Home Secretary (Schedule 1, para. 1 (3)). While they are thus ordinary civil servants, capable of being transferred from or to other departments of the civil service—a fact which makes for flexibility in appointment—they are quite independent of and cannot be directed, or even given general guidance, by the Home Secretary in the exercise of their day-to-day functions under the Act, because the Act gives the Home Secretary no power to do so. On the contrary subsection (3) of section 1, by giving the Commissioners a statutory function, gives them also independence. Subsection (4) further emphasises their independence, while at the same time making trustees independent of the Commissioners, who are expressly disabled from acting in the administration of a charity. The Home

[12] References herein to the Commissioners are to be taken to include the Minister, so far as the context permits.

Secretary's power, under section 43, to make regulations is something quite different. Such regulations have to be laid before Parliament and are subject to either negative or affirmative resolution: they are not to be equated with guidance in day-to-day matters or in general policy. It is true that the Commissioners must make an annual report to the Home Secretary (section 1 (5)), and he is made responsible to Parliament for the general functioning of the Commission, but he is not responsible for the decisions of the Commissioners in relation to particular charities, because the discretion is theirs and not his. In so far as they are answerable for the exercise of their discretion, they are answerable to the courts, because an appeal lies from their decisions to the courts and not to the Home Secretary. It may be observed that a curious anomaly exists as between the Home Secretary and the Minister because the latter can be questioned about individual charities.

Now that the Home Secretary is to answer questions in Parliament concerning the Charity Commission, the office of Parliamentary Charity Commissioner disappears: formerly the Parliamentary Charity Commissioner represented the Commission in Parliament. On the second reading of the Bill in the Commons the Solicitor-General explained [13] that the reasons why the Home Secretary, and not the Lord Chancellor, had been selected as the Minister responsible for the Commissioners were, first, that when it was a question of answerability for the efficiency of a public department it was better to have a Minister who was in the Commons, and, secondly, because the Home Secretary seemed constitutionally the right person since, as Secretary of State, he was in a sense the residuary legatee of all Government functions.

An important difference between the two central authorities is perpetuated and is immediately apparent. On the one hand are the Commissioners, a body exercising judicial as well as administrative functions under the Act, and a body entirely independent of the executive so far as those judicial functions are concerned; in their daily work they are concerned only to carry out the duties which the Act lays upon them. On the other, is the Minister of Education, a Minister of the Crown, whose charitable trust jurisdiction must inevitably constitute only a minor part of his work, who will probably not be a lawyer, who must for that and other reasons depend upon the legal staff of the Ministry for the day-to-day exercise of his charitable functions, and whose executive duties as a member of the government might well not coincide with the interests of charities in respect of which he acts. There is a great

[13] *Hansard* (Commons), April 28, 1960, col. 482.

number of educational charities, and convenience obviously suggests that the Minister of Education should have jurisdiction over them, but it is impossible not to draw a critical comparison between the constitution of the two authorities. It is true that the Minister and his predecessor, the Board of Education, have had jurisdiction over educational trusts for sixty years, and that the arrangement has worked well enough, but more recently, other charities, with an educational connection which is sometimes a little tenuous, have been transferred to his care, and in their case it is not so easy to say that administrative convenience counterbalances any possible disadvantage, from the point of view of charity, in the Minister being the authority to act. Accepting the desirability of the Minister having a special responsibility for educational charities, it seems that a satisfactory arrangement would have been the creation of a body of educational charity commissioners having the same status as the Charity Commissioners and standing in the same relation to the Minister as the Charity Commissioners stand to the Home Secretary. Alternatively, there might have been an educational commissioner included in the body of the Charity Commissioners but having a special duty of liaison with the Ministry of Education so far as educational charities were concerned. The Orders under which jurisdiction over other than purely educational charities was transferred to the Minister have been repealed, and it remains to be seen how a division of responsibility will be made under section 2 (2). If the Minister's functions are restricted to truly educational charities there may be little cause for concern.

Unless clear guidance is given by means of regulations, difficulty seems likely to arise in some cases where doubt exists as to whether it is the Commissioners or the Minister who will in practice exercise jurisdiction, and trustees may well feel some alarm at section 2 (3), which provides that a person who has occasion to make an application, give any notice, or do any other thing which may be made, given or done equally to the Commissioners or to the Minister, shall take such steps as are reasonable to secure that it is made, given or done to whichever should act in the matter: albeit the application, notice or other thing is not ineffective because the wrong authority is approached. In the past, doubt has often existed as to whether the Commissioners or the Minister had jurisdiction, *e.g.*, in the case of village-hall charities. It would be a pity if a similar sort of difficulty existed under the Act. In this connection it may be observed that often, of course, one charity provides different sorts of benefits—*e.g.*, almshouses and a village hall—so that in the past the Commissioners have had jurisdiction in respect

of some of its objects and the Minister in respect of others. Doubtless it is open to trustees who are in doubt as to which authority will act, to make preliminary inquiry by letter of either or both of them, but it seems a pity that the difficulty should be there at all and also that its removal should require additional work both for the trustees and for the central authorities.

Section 3 makes provision for an official custodian for charities. He will be an officer of the Charity Commissioners and will succeed The Official Trustee of Charity Lands and The Official Trustees of Charitable Funds, whose duties he will combine. Subsection (8) provides that the Minister shall have no functions in regard to him, and the Minister cannot vest in, or transfer to him, property save in the limited circumstances provided for by section 20 (1) (ii) (11) (under the power to act for the protection of charities) and section 22 (6) (12) (common investment scheme). Further provisions, in sections 16 and 17, relating to the official custodian are referred to below in connection with Part III of the Act. The transitional provisions relating to the transfer of functions of The Official Trustee of Charity Lands and The Official Trustees of Charitable Funds will be found in section 48 (6).

Part II—Provisions for Inquiring into, Making known and Co-ordinating Charitable Activities

Register of charities

Sections 4 and 5, which are entirely new, provide for the constitution, compilation, maintenance and operation of the central register of charities. Section 4 (10) contemplates that the Minister will maintain part of the register; but it appears that, unless the Commissioners and the Minister agree between themselves that there shall be two registers, there will in practice be only one, maintained by the Commissioners.[14] Trustees have a positive duty to apply for registration, where it is appropriate, and to furnish the Commissioners with the documents and information relevant to registration: section 4 (6). It is intended that the register should be a card index, on which will appear the particulars of the functions of a trust including, unless they are voluminous, subsidiary functions. It will also include the approximate annual income of the trust and a reference to any land which it holds. There will be a cross-reference to the deed of trust, which will be filed elsewhere in the offices of the Commissioners and will normally be available for inspection; if the founder of the charity wishes to remain

[14] *Hansard* (Commons, Standing Committee A), June 2, 1960, cols. 146, 147, Mr. Renton.

anonymous, some other way will be found of letting the public have particulars of the trust without disclosing the founder's name.[15]

All charities are registrable unless relieved from the requirement of registration by subsection (4) of section 4, and those within that subsection may register voluntarily: section 4 (2). The fact that a charity is already registered for some limited purpose under some other statutory provision (*e.g.*, with the local authority under the War Charities Act, 1940, as a war charity, or section 41 of the National Assistance Act, 1948, as a blind charity) is not in itself a reason for excepting it from registration under the Act. Such registration has no real relevance because the purpose of this central register is to collect and make available complete information about organisations administering property for charitable purposes, showing what charities exist, where it is possible to communicate with them and what purposes they serve. At present no one knows how many charities exist in England and Wales or can do more than hazard a fairly accurate guess, but the Government's estimate of the number which will require to be registered is 150,000. A five-year programme is contemplated to complete the task of registration, the registration of existing charities being undertaken by stages, though charities founded on and after January 1, 1961, will be immediately registrable if within the registration provisions.[16]

An institution which no longer appears to be a charity is to be removed from the register: section 4 (3). There are various ways in which an institution can lose its charitable status. Thus, a charitable company may change its objects, so that they are no longer charitable; or there may be a revocable trust which is in fact revoked; or an institution may be found not to be charitable because a decision of the court shows that a particular purpose, till then supposed to be charitable, is in fact not so. A case in point is *Inland Revenue Commissioners* v. *Baddeley*.[17] If an institution is removed from the register it is for consideration whether a scheme is required to apply its assets for some other charity, which will itself prima facie be on the register or liable to be put thereon.

The register will provide an index, first, for the purposes of potential beneficiaries; secondly, for social workers; thirdly, for potential benefactors, who will be able to see what openings for charity there are in particular directions; and, fourthly, for charities and local authorities to see what the other is doing. The register will be of value to trustees who, by knowing what other trustees

[15] *Hansard* (Commons), April 28, 1960, col. 483, Solicitor-General; *Hansard* (Commons, Standing Committee A), May 26, 1960, col. 88, Mr. Renton.
[16] *Hansard* (Lords) March 1, 1960, col. 567, Viscount Kilmuir, L.C.
[17] [1955] A.C. 572.

are doing, may be able to employ their resources better while still keeping within the terms of their trusts. So far as local authorities are concerned, it is useful that they should know what is being done within their areas by voluntary effort. From the point of view of the charity, registration has a very great advantage; namely, that as long as an institution is on the register it is conclusively presumed to be a charity (s. 5 (1)), and so, for example, automatically qualifies for relief from income tax. In this connection it is to be observed that section 9 (1) makes provision for consultation between the Charity Commissioners, the Commissioners of Inland Revenue and local authorities so as to ensure that institutions which have hitherto been accepted as charities for fiscal purposes are placed upon the register. It should in future generally be possible to resolve cases of doubt by inter-departmental agreement rather than by litigation, which inevitably involves the claimant in expense. So far as the public benefit is concerned, the information resulting from registration should mean that the best use will be made of charitable resources, with a minimum of overlapping and duplication.

While the advantages of registration are, then, generally considerable there are, on the other hand, certain charities in regard to which the index would have no useful application, while there are others in regard to which information may be obtained elsewhere, and it is not proposed that they should be registered just for the sake of completeness.[18] The intention is that they should be excepted by regulations from the registration requirements. The Lord Chancellor on second reading in the Lords emphasised that the intention was that registration should be flexibly regarded and flexibly carried into effect.[19]

In considering what charities are relieved from the requirement of registration, it is essential to appreciate the distinction between exempt charities (s. 4 (4) (*a*)) and those excepted from registration by order or regulations (s. 4 (4) (*b*)). Exempt charities within section 45 and Schedule 2 have been referred to above, where it was explained that they were exempt from the supervisory and inquisitorial provisions of the Act. Excepted charities, on the other hand, are generally subject to those provisions but excepted from the provisions of section 4 (register of charities) or section 8 (submission of accounts) or section 29 (restrictions on dealing with charity property) or from any two or all three of those sections: it is to be particularly noted that exceptions from the provisions of one of those

[18] *Hansard* (Lords) March 22, 1960, col. 95, Viscount Kilmuir, L.C.
[19] *Hansard* (Lords) March 1, 1960, col. 642.

sections does not automatically involve exception from the provisions of the others.

Precisely how the power, contained in section 4 (4) (*b*), to except charities from the requirement of registration will be exercised remains to be seen, though the first regulations may be expected in the near future. One category of charities particularly mentioned as suitable for exception is the working funds of churches and the large number of small religious funds which they administer, and which are of denominational interest only. But it is not proposed to except any land occupied for the purpose of the charity, except in so far as it comes within the wide definition of a place of religious worship (s. 4 (4) (9)) and is therefore registered under the Places of Worship Registration Act, 1855; or any secular welfare charity for the benefit of the members of a particular denomination.[20]

Where a charity is a national organisation with subsidiary charities—*e.g.*, the Boy Scout movement—the intention is that the central charity should be registered, but not the subsidiary charities, which will, however, be referred to by means of a list giving an indication of where particulars of them may be found, and giving reasonable detail about them.

In order to qualify for relief from registration under paragraph (*c*) of section 4 (4) a charity must be without any permanent endowment, that is, property which must be retained as capital (see s. 46); without property (albeit itself expendable as income) which brings in an income of more than £15 a year; and without land which it uses and occupies (even though such land is not permanent endowment). So far as permanent endowment is concerned, it is clear that it will normally be desirable for the existence of a charity of a permanent nature to be recorded. So far as charities without endowment are concerned, £15 was selected as the lower income limit for purposes of registration, first, because it represents an accumulation of funds of about £500, and that was thought a sufficiently considerable sum to be worth recording; and secondly, because the figure of £15 is, for tax relief purposes, administratively convenient, because interest above that figure in a savings bank deposit attracts the attention of the Commissioners of Inland Revenue.[21] The purpose of requiring registration of charities having the use and occupation of land is to further the recommendation of the Pritchard Committee on the rating of charities and kindred bodies[22] that machinery be provided to enable local authorities to

[20] *Hansard* (Commons, Standing Committee A), May 31, 1960, cols. 122–124, Mr. Renton.
[21] *Hansard* (Lords), March 21, 1960, col. 59, Minister Without Portfolio, (Earl of Dundee).
[22] 1959, Cmnd. 831.

ascertain, for the purpose of rating relief, whether the occupier of land in their area is a charity. For rateable occupation there must be something more than temporary occupation under licence and "use and occupation" therefore implies the legal right to exclusive occupation and actual occupation under that right.

Section 5 (2) provides that a person who is or may be affected by the registration of an institution as a charity may, on the ground that it is not a charity, object to its being entered by the Commissioners in the register, or apply to them for it to be removed from the register. The purpose of this provision is to protect people, especially next-of-kin, whose interests may be affected by the question whether or not the charity in question ought to be classified as a charity. Thus if a testator leaves money to a charity, and his next-of-kin think that there is strong reason for claiming that the institution in question is no longer entitled to be regarded as a charity, and to be registered as such, it is right that he should have the opportunity of making representations to the Commissioners to that effect. No time-limit is placed upon the making of representations; that is to say, it makes no difference how long the charity has been on the register. A limit would not be appropriate, since many years might elapse between the date of the will making the gift and the death of the testator, and the next-of-kin would not know about the gift until the death. Nor is there any time-limit for an appeal to the High Court under section 5 (3) against a decision of the Commissioners to enter, or not to enter, an institution in the register, or to remove, or not to remove, it therefrom. On the other hand, so far as an appeal from the High Court is concerned, the ordinary time-limit for appeal will operate. The Commissioners of Inland Revenue, who are directly affected on the question of the taxability of a charity, and rating authorities are also persons affected by the registration of an institution as a charity. Concern has been expressed lest people with no real interest but with, perhaps, a general antipathy for charities, might make objection under section 5 (2); it appears that this danger may be largely nullified by regulations being made enabling the Commissioners, where an application is obviously frivolous, to deal with it simply on the preliminary letter.[23]

Gifts to registered charities

It must be observed that there is a distinction between the consequences of a gift for a specific purpose to an institution which is on the register, and a gift to such an institution for its general purposes. In the first case, whether or not the gift is charitable

23 *Hansard* (Lords), March 22, 1960, col. 82, Viscount Kilmuir, L.C.

must be determined by the ordinary law, and it makes no difference that the institution is registered. In the second case, the gift takes effect as a good charitable gift unless and until the institution is removed from the register as the result of proceedings taken to that end, in which case there will be a resulting trust for the donor, and, indeed, all the property held by the institution, including any unspent income, will be forthwith held upon resulting trusts; but the trustees are completely protected as to income which they have expended.

Inquiries

Sections 6 and 7 re-enact, with some modifications, the existing powers of inquiry of the Commissioners, but the power given to the Commissioners by section 6 (5) to pay to any person the necessary expenses of his attendance at an inquiry to give evidence or to produce documents is new. Inquiries instituted by the Commissioners may take many forms, from an exchange of letters which reveals that trustees, in failing in some respect in their duties, have done so merely by reason of an oversight, with the result that the whole matter is immediately put right, to an inquiry on oath, possibly leading to proceedings instituted by the Attorney-General against the trustees in the Chancery Division. Whether or not the report of the person conducting the inquiry is published is a matter in the discretion of the Commissioners (s. 6 (7)), but it may be expected that a report would be published if the matter were of general public concern.

Accounts

Section 8 replaces the Commissioners' existing powers to call for statements of account and confers on them a new power to require accounts to be audited. It is only in the case of a charity having a permanent endowment that trustees have a duty to render accounts yearly. In other cases accounts need be supplied only on the request of the Commissioners, and even in the case of a charity with a permanent endowment the requirement that annual accounts be supplied may be waived by order or regulations. As mentioned above, the fact that a charity is excepted from the need to register by an order or regulations made under section 4 (4) (*b*) does not necessarily mean that it will be relieved of the necessity of rendering accounts under section 8 (1): from that requirement it must be specifically excepted, albeit the exception may be incorporated in the same order or regulations as provide for exception from registration.

Local authorities' rights and powers

Reference has already been made above, in connection with registration, to section 9 (1), a new provision providing for the exchange of information between government departments and local authorities. Section 9 (2) enables not only (as before) copies of accounts to be obtained from the Commissioners, but also copies or extracts of other documents, including the register of charities.

A number of the recommendations of the Nathan Committee in regard to the relationship between local authorities and charity were rejected. Thus the Government did not accept the suggestion that trustees should be required to send a copy of their accounts to the local authority concerned; that in the case of local trusts the local authority should have the right to take the initiative in applying for schemes; and that the councils of counties and county boroughs should have compulsory powers to enable them to carry out reviews of charities in their areas. But sections 10, 11 and 12, which are entirely new, nevertheless confer important powers on local authorities and on charity trustees, in particular in relation to local authorities. Their purpose is to remove the last obstacles, the last suspicions, the last argument that Parliament does not approve co-operation between the voluntary and the statutory services.[24]

Section 10 (1) empowers the councils of counties, boroughs, including boroughs included in rural districts (as to which, see the Local Government Act, 1958, s. 28 (3) (5) and Schedule 7), metropolitan boroughs in London, the Common Council of the City of London (s. 10 (7)) and urban districts (s. 10 (6)) to maintain indices of local charities. The power of urban district councils to do so is subject to there being first a resolution by the council that the provisions of the section be adopted (s. 10 (6)). Generally speaking, urban districts, being recent growths, contain far fewer charities than the boroughs, many of which are of great antiquity, so that there are likely to be many urban districts where it will not be worth while to maintain a local index. The object of requiring a resolution is to save the Commissioners incurring trouble and expense in making extracts from the central register where such extracts are not in fact going to be used.[25] The Commissioners must on request supply free of charge copies of such entries in the central register as are relevant to any particular local index (s. 10 (2)), but the local authority index can go beyond the central register. In so far as it does, it will depend on the co-operation of, and the information voluntarily vouchsafed by, the local charity.

[24] *Hansard* (Lords), March 1, 1960, col. 566, Viscount Kilmuir, L.C.
[25] *Hansard* (Commons), July 15, 1960, col. 1850, Mr Renton.

But the details will be the same as those on the central register in so far as they are supplied by the Commissioners. A local authority index is to be open to public inspection at all reasonable times: section 10 (3). A council may, for the purposes of the section, employ any voluntary organisation, and the council of a county may employ the council of any county district in the county, or the divisional executive (within the meaning of the Education Act, 1944, Sched. 1, Pt. III) for any part of the county as their agent (s. 10 (4)), and a joint board discharging any of a council's functions is given the same powers in respect of local charities established for purposes similar or complementary to any services provided by the board (s. 10 (5)).

A local council, empowered by section 10 to maintain a local index, is enabled by section 11 (1) to initiate a review of the working of local charities (other than ecclesiastical charities (s. 11 (3)) within its area, and make to the Commissioners such report on the review and such recommendations as the council, after consultation with the trustees, thinks fit: but no such review can be made without the consent of the charity trustees (s. 11 (3)). A council having power to initiate reviews may co-operate with other persons in any review by them of the working of local charities in the council's area (with or without other charities), or may join with other persons in initiating and carrying out such a review (s. 11 (2)). No review initiated by the council of a borough is to extend to the working in any county of a local charity established for purposes similar or complementary to any services provided by county councils, unless the review is initiated with the consent of the council of that county or the council initiating the review provides those services in its area under delegated powers (s. 11 (4)). The provisions of section 10 as regards the employment of voluntary organisations and the powers of joint boards apply (s. 11 (5)). The function of local authorities under the section is to take the lead in arranging a conference where trustees and representatives of local authority services can, if they wish, sit down together and review the work they are all doing as a whole, so as to eliminate overlapping and enable the best use to be made of charitable resources,[26] and a review should have the effect of indicating the scope of existing charitable activities within the area in question and suggesting how they may best be co-ordinated with statutory activities in the same area.

It has been suggested that a charity which refused to participate in a review under section 11 might alienate the favour of the public,

[26] *Hansard* (Commons), April 28, 1960, col. 414, Home Secretary.

that it might therefore feel compelled to agree to participation against its will, and that that is an invidious position for the charity. The suggestion is that local authorities might seek to initiate reviews in an interfering frame of mind, rather than with a genuine desire to further the purpose of the Act of promoting the greatest possible public benefit. It is, of course, possible that such a fear may not be entirely groundless, but it may reasonably be hoped that far more good than harm will come out of the provision for review. At all events it would be open to trustees who felt dubious whether or not they should co-operate in a review to go to the Commissioners under section 24 and seek advice. If the Commissioners felt that a review was not called for, that opinion on being communicated to the local authority in question would presumably put an end to any pressure on the trustees that there might have been. Likewise, the local authority might go to the Commissioners if a charity were not prepared to take part in a scheme of co-operation; but it seems that it would be extremely difficult for the Commissioners to take any action, even if they felt that the trustees were acting in a shortsighted and unreasonable way. Where, on the other hand, the trustees were not carrying out their duties, so that the charity was not being properly operated, the Commissioners could clearly act to put matters right.

Section 12 should prove particularly valuable in minimising the overlapping of statutory and charitable resources on the one hand and on the other in making it possible for statutory services to be supplemented with charitable benefits to the best advantage. Unlike the previous two sections it extends to all local councils, thus recognising the important part played by parish councils in connection with local charities. Like those sections, it extends also to joint boards. Subsection (1) empowers a council or board to make, with any charity established for purposes similar or complementary to services provided by the council or board, arrangements for co-ordinating the activities of the council or board and those of the charity in the interests of persons who may benefit from those services or from the charity. A council or board may disclose to any such charity, in the interests of those persons, any information obtained in connection with the services provided by the council or board, whether or not arrangements have been made with the charity under this provision. Subsection (2) gives to charity trustees, notwithstanding anything in the trusts of the charity, power to do all or any of the following things where it appears to them likely to promote or make effective the work of the charity; namely, co-operate in any review undertaken in accordance with the provisions of section 11 or otherwise of the working of charities

or any class of charities, make arrangements with a local authority acting under subsection (1), or with another charity for co-ordinating their activities and those of the authority or of the other charity, and publish information of other charities with a view to bringing them to the notice of those for whose benefit they are intended. The expense of doing these things may be defrayed out of any income or moneys applicable as income of the charity.

Part III—Assistance and Supervision of Charities by Court and Central Authorities

One of the most important features of the Act is the extension by sections 13 and 14 of the *cy-près* doctrine. Where the circumstances admit resort being had to the doctrine the court (or the Commissioners) can usually find suitable new purposes without difficulty, but those circumstances had been shown to be in practice too circumscribed by the existing law. Section 13 not only gives statutory expression to the existing circumstances in which a *cy-près* scheme may be made and—a very important point—declares the duty of a trustee to take steps to obtain a scheme where the occasion arises (subs. (5)), it also adds to the number of those circumstances; as, for example, by allowing the funds of two charities which can be more effectively used in conjunction with each other to be amalgamated (subs. (1) (*c*)) and providing for further enlargement of the field of local charities (subs. (4) and Sched. 3). But the section does not alter the law except by defining the conditions to be fulfilled in lieu of failure of the trust; that is, the conditions which can take the place of failure of the trust. Thus, the circumstances enumerated in subsection (1) as those in which the original purposes of a charitable gift can be altered to allow the property to be applied *cy-près* are dependent on the existence of a general charitable intent (subs. (2)). It is only in the circumstances referred to in section 14 that the existence of a general charitable intent is not paramount.

An expression which appears several times in section 13, "the spirit of the gift," called forth an expression of concern from Viscount Simonds when the Bill had its second reading in the Lords.[27] His Lordship felt doubt as to its meaning, and to how, without guidance, the court and the Commissioners were to determine the limits of their powers. Whether this expression will in practice give rise to difficulty remains to be seen.

[27] *Hansard* (Lords), March 1, 1960, col. 601.

Unidentifiable donors

Section 14 effects a substantive change in the law in respect of gifts to charity, and does so retrospectively (subs. (7)). While it leaves unimpaired the general rule that where there is a specific charitable intention which is satisfied, or, alternatively, proves incapable of attainment, there is a resulting trust in favour of the donor and there is no room for the doctrine of *cy-près*, it legislates for the particular case where gifts are made in such circumstances that the resulting trust cannot in practice be executed, because the donors cannot be traced or identified. This state of affairs not infrequently arises when there is an appeal to the public for some charitable purpose—*e.g.*, the hospital building fund in *Re Ulverston and District New Hospital Building Trust, Birkett* v. *Barrow and Furness Hospital Management Committee*,[28] which fails, and contributions are received through the medium of collecting-boxes and in other ways which preserve the anonymity of the donors. In those circumstances the court, on being asked for directions by the trustees, was bound to order an inquiry, which was inevitably expensive and likely to lead, so far at least as a great part of the donations was concerned, to the moneys received being held to be *bona vacantia* or, more probably, to their being paid into court to await claim by owners who would in fact never come forward to claim them. But while there was clearly a great need to deal with money which might be liable to this fate, and to preserve it for charity and from being condemned to lie in idleness, at the same time it was necessary to bear in mind that many appeals are started with a large gift, which constitutes the nucleus of the fund, and it was obviously desirable that, in the event of failure of the specific purpose, the donor would have no cause to complain that he had been treated unfairly or subjected to sharp practice.

Section 14 proceeds on the basis that gifts within it still belong to the donors. Subsection (1) declares that property given for a particular charitable purpose shall be applicable *cy-près* if it belongs either to donors who cannot be identified or found or to donors who disclaim it. If donors who disclaim were not included, a mere disclaimer might result in the property becoming *bona vacantia*. Subsection (4) backdates a disclaimer to the date of the gift: this may be very important from the point of view of estate duty liability. In the case of property within subsection (1), but not within subsection (2) or subsection (3), advertisement and inquiry for unidentified donors is necessary. What advertisement is necessary must clearly depend upon the circumstances of the case,

[28] [1956] Ch. 622.

including the amount involved, bearing in mind the general principle that it is the duty of the trustee to pay the trust property to his beneficiaries and that this involves the duty to communicate with the beneficiaries if he reasonably can. Where there are surplus funds, some derived from identifiable and some from unidentifiable sources, the former will have to be returned to the donors (unless they disclaim), while the latter are applied under the provisions of this section.

Subsection (2) is concerned with those cases where the identification of donors with any degree of certainty is, by reason of the nature of the gifts, virtually impossible. This subsection expropriates for charity all moneys subscribed in the ways mentioned therein whether or not the subscribers want their money back, and in cases within this subsection a scheme may be made by the Commissioners as well as by the court. Subsection (3), on the other hand, gives the court, but not the Commissioners, power to expropriate for charity any property which it would be unreasonable to attempt to return to the donors, either because the expense involved would be out of all proportion to any success likely to attend the attempt, or because for one reason or another it would be unreasonable for a donor to expect his property to be returned. This covers the case of, for example, collecting-cards. This subsection, in giving jurisdiction to the courts, but not to the Commissioners, recognises and maintains the principle that the Commissioners ought not to have power to determine, as regards property claimable by a charity and claimable adversely to it, to whom it should belong: it would be a breach of that principle to allow the Commissioners to expropriate for charity property which, *ex hypothesi*, might belong to a private person. It is likely that in practice this jurisdiction will normally be exercised when the court is already seised of the matter; *e.g.*, the matter may be before it for determination of the question whether or not there is a resulting trust. Subsection (4) preserves the right of a donor to claim back what he gave, provided that he does so within twelve months of a scheme being made under the section; save that he cannot make a claim where property is applied *cy-près* by virtue of subsection (2) or subsection (3).

Amendment of Royal Charters

Under the previous law, where a charity was governed by Royal Charter the ordinary power to make a *cy-près* scheme could not be exercised if its effect would have been to alter the Charter. It followed that an alteration of trusts in such a case could be achieved only at great expense. Now section 15 gives a new power to amend

a Royal Charter by scheme and hence without cost to the charity; but subject to the qualification that the scheme does not come into effect until the Queen, by Order in Council, amends the Charter in such manner as to give effect to the scheme. The section also empowers the court to exercise jurisdiction over certain charities, referred to in Schedule 4, which are governed by or under statute.

Official custodian

Section 16 (1) gives the court and—by virtue of the concurrent jurisdiction which they possess under section 18, which is dealt with below—the Commissioners unlimited jurisdiction by order to vest property held in trust for a charity in the official custodian for charities, while section 16 (2) enables personal property, including for this purpose real securities, to be transferred to him with his agreement without an order. Section 16 (3) provides for the discharge of the official custodian, and section 16 (4) for the making of vesting orders and giving of directions consequential on his discharge, or the trusts of property which he holds coming to an end. Section 16 (5) provides that no person shall be liable for any loss occasioned by his acting in conformity with an order made under the section or by his giving effect to anything done in pursuance of such an order, or be excused from doing so by reason of the order having been in any respect improperly obtained. No vesting or transfer of any property in pursuance of this section is to operate as a breach of a covenant or condition against alienation or give rise to a forfeiture. Section 17 contains supplementary provisions as to property vested in the official custodian. In particular it deals with his status as a custodian trustee, to a great extent assimilating his position to that of the Public Trustee. The official custodian's duties include management only in the case of a common investment fund (s. 22 (6)). Section 17 (1) emphasises that ordinarily he has no powers of management, and it is desirable that the position is made plain, since there are those who, quite without justification, are unwilling to see a custodian trustee appointed, fearing interference by the custodian in the trustees' administration of the charity.

Commissioners' powers to make schemes, etc.

Section 18 (1) empowers the Commissioners to exercise jurisdiction concurrent with that of the High Court to make schemes, to appoint, discharge and remove trustees, officers and servants, and in regard to the vesting of property. Disputed matters of title and the validity or otherwise of a charge or trust are not, however, within the Commissioners' jurisdiction (s. 18 (3)). Ordinarily

jurisdiction can be exercised by the Commissioners only on application being made by the charity or on reference by the court, but the Commissioners may, if satisfied that the charity trustees ought in the interests of the charity to apply for a scheme, but have unreasonably refused or neglected to do so, apply to the Home Secretary for him to refer the case to them with a view to a scheme, and if, after giving the trustees an opportunity to make representations to him, the Home Secretary does so, the Commissioners may proceed accordingly without an application, but have no power in such a case to alter the purposes of a charity, unless forty years have elapsed since the date of its foundation: section 18 (2) (4) (6). The Minister may proceed with a view to a scheme in the circumstances in which the Commissioners are able to apply to the Home Secretary for him to refer a case to them: section 18 (13). Special provision is made for the case of charities with an income from property not exceeding £50 a year; the Commissioners may in their case exercise jurisdiction on the application of the Attorney-General or of any one or more of the charity trustees or of any person interested in the charity, or, in the case of a local charity (as defined in section 45 (1)), of any two or more inhabitants of the area of the charity (s. 18 (5)). Section 18 (7) empowers the Commissioners to discharge a trustee at his request. Section 18 (8) provides for notice of the Commissioners' intentions to be given. Section 18 (9) precludes the Commissioners from acting if they think that the case, by reason of its contentious character, or of any special question of law or of fact which it may involve, or for other reasons, is more fit to be dealt with by the court. Subsection (10) of section 18 gives the Attorney-General an absolute right of appeal against orders of the Commissioners under this section, but subsections (11) and (12), which confer a right of appeal on a number of persons, require leave to appeal to be given by the Commissioners or a judge of the Chancery Division, the justification for this degree of control over appeals being that, in general, the costs of all parties to an appeal come out of the charitable funds. It is envisaged that the procedure on application to a judge for leave to appeal will be on the documents alone, similar to the procedure under the Pensions Appeals Tribunal Act, 1943, and R.S.C., Ord. 55E.[29]

Section 19 effects a great simplification of the parliamentary scheme procedure, and also a great saving of expense to charities which require such a scheme. A scheme amending the trusts of a

[29] *Hansard* (Commons, Standing Committee A), June 23, 1960, col. 270, Solicitor-General.

charity regulated by statute is now given effect by an Order of the Home Secretary, or of the Minister, if he is acting in the matter, in the form of a statutory instrument, but the draft of the Order requires the consent of both Houses of Parliament: section 19 (1) (2) (3) (9). The expenditure of money of a charity (other than an exempt charity) in preparing or promoting a parliamentary Bill without the consent of the court or the Commissioners is forbidden by section 19 (7). A Bill will now seldom, if ever, be necessary. Section 19 (8) empowers the Commissioners to authorise trustees to apply income *cy-près* in advance of the establishment of a scheme, within certain limits.

Section 20, which is new, but subsections (1) and (2) of which are modelled on the War Charities Act, 1940, ss. 5, 9 (2) (3), gives the Commissioners a new power to act for the protection of charities —by removing and appointing trustees of their own motion and preventing the operation of bank accounts—where there has been misconduct or mismanagement. The provisions of the War Charities Act referred to have proved valuable and have emphasised the unsatisfactory nature of the jurisdiction to protect charities in other cases, in most of which the only action open to the Commissioners after holding an inquiry was to report the case to the Attorney-General; by the time proceedings had been started in the Chancery Division it might well happen that further assets of the charity would have been lost. The mischiefs aimed at—*e.g.*, excessive remuneration of persons acting in the affairs of the charity—do not typically occur in the case of charities established as strict trusts, but mainly in the case of collecting charities.[30] Further powers of removal and appointment of trustees are given to the Commissioners by section 20 (3) (4). Section 20 (7) gives a right of appeal which is generally similar to that given by section 18 (10) (11), but with this difference, that no leave to appeal is required by a person removed from office under section 20 (1) (i). Section 20 (9) requires the Commissioners to give notice of their intention to proceed under this section. Reference has been made above, in connection with the constitution of the official custodian, to the exceptional power of the Minister under section 20 (11) to vest property in or transfer property to the official custodian under section 20 (1) (ii).

Section 21, which is largely re-enactment, provides for due publicity being given for proceedings under sections 18, 19 and 20. A proviso to subsection (2) gives a new discretion to withhold publicity of an order discharging or removing a trustee.

[30] *Hansard* (Commons, Standing Committee A), June 23, 1960, col. 276, Solicitor-General.

Joint management of funds

Section 22 is new, but it gives statutory effect to an existing practice whereby two or more charities delegate to joint nominees the management of their common funds, the arrangement being sanctioned by scheme. Such a common investment scheme, establishing a common investment fund, contains trusts which provide for property transferred to the fund by or on behalf of a charity participating in the scheme to be invested under the control of trustees appointed to manage the fund, and for the participating charities to be entitled (subject to the provisions of the scheme) to the capital and income of the fund in shares determined by reference to the amount or value of the property transferred to it by or on behalf of each of them and to the value of the fund at the time of the transfers: section 22 (1). Section 22 (5) provides that a common investment scheme may include provision for enabling sums to be deposited at interest in a common investment fund. Section 22 (6) not only allows the assets of a common investment fund to be vested in the official custodian, but also allows him to be appointed (with the consent of the Commissioners if the scheme is not made by them) as managing trustee of the fund, this being the sole exception to the general rule (see s. 17 (1)) that the official custodian shall not exercise powers of management. Also exceptionally, the Minister may make a scheme vesting in the official custodian the funds subject to it: section 22 (12). When exercising powers of management the official custodian is to be advised by a panel of investment advisers.

Miscellaneous powers

Sections 23 to 27 confer various powers on the Commissioners. Section 23 generalises and greatly shortens the existing provisions empowering them to authorise transactions beneficial to a charity. Section 24 (1) re-enacts the Commissioners' power, on application being made to them, to give a charity trustee their opinion or advice on any matter affecting the performance of his duties as such, but does not lay a positive obligation on them to consider an application, as did the previous law. It is silent as to the manner in which the opinion or advice is to be given but the practice has been to give it informally, and seldom formally, as provided by the previous law. Section 24 (2) provides that a charity trustee or trustee for a charity acting in accordance with the opinion or advice given him, shall be deemed, as regards his responsibility for so acting, to have acted in accordance with his trust, unless, when he does so, either he knows or has reasonable cause to suspect that the opinion or advice was given in ignorance of material facts, or the

decision of the court has been obtained on the matter, or proceedings are pending to obtain one. Both under the previous law and under this section it is possible for either the trustees as a whole, if there is more than one trustee, or a sole trustee, or one of several trustees to ask the Commissioners for advice. If a trustee insists on applying to the Commissioners for advice when the majority of the trustees are in substance right, it is open to the Commissioners to get over the difficulty by asking the trustees as a whole to submit the point for their advice. But it is essential for one of several trustees to be able to go to the Commissioners because it is quite possible that he is right and the majority wrong. It will be noticed that while only a "charity trustee," an expression defined in section 46 as meaning a person having the general control and management of a charity, can apply under section 24 (1), a "trustee for a charity" is also protected under section 24 (2). The expression "trustee for a charity," which is used in various sections of the Act, is not defined, but it is clear that it is used in a narrower sense than "charity trustee," which includes a person who is not necessarily a trustee at all in the ordinary sense, *e.g.*, because he has never been appointed, although he is acting in the trusts of the charity. Section 25 contains powers for the preservation of charity documents. Section 26 empowers the Commissioners to order that a solicitor's bill of costs be taxed. Section 27 (1) enables the Commissioners to take proceedings on behalf of a charity entitled to receive a rentcharge which is unpaid, with a view to recovering the rentcharge or compelling payment. Section 27 (2) provides for the redemption of charity rentcharges and thus furthers the policy of redeeming small annual charges on land which has been applied with advantage to tithe and land tax.

Charity proceedings

Section 28 consolidates what was believed [31] to be the existing law regarding the institution of "charity proceedings," an expression defined in subsection (8). It is to be observed that the definition is not such as to include actions, whether legal or equitable, to enforce common law rights or to enforce individual equitable rights not relating to the administration of a charitable trust; or an application to determine whether a trust is charitable or not; or an application claiming any property or seeking any relief adversely to a charity. The form of proceedings is left to be regulated by rules of the court.

Section 28 (1) provides that proceedings may be taken either by the charity, or by any of the charity trustees, or by any person

[31] *Hansard* (Lords), March 1, 1960, col. 570, Viscount Kilmuir, L.C.

interested in the charity, or by any two or more inhabitants of the area of the charity, if it is a local charity, but not by any other person. Ordinarily the leave of the Commissioners is required (s. 28 (2)), or, if the Commissioners refuse leave, the leave of a judge of the Chancery Division (s. 28 (5)), but no leave is required for the taking of proceedings in a pending cause or matter or for the bringing of an appeal (s. 28 (4)), and the Attorney-General has an absolute right to institute proceedings, with or without a relator (s. 28 (6)). Section 28 (3), which places a positive obligation on the Commissioners to refuse to authorise charity proceedings where the case is within their jurisdiction and they could properly deal with it, is new, though in practice, of course, the Commissioners have exercised their discretion in this connection in the manner in which the statute now indicates that it is to be exercised. The provision whereunder leave to take proceedings may be obtained from a judge is new. The Lord Chancellor explained on second reading in the Lords that this alteration in the law was being effected because it seemed strange to modern ideas that an administrative body could finally bar access to the court, without any appeal or redress, unless the applicant could persuade the Attorney-General to proceed *ex officio*.[32]

The courts have always proceeded on the basis that in the execution of their jurisdiction regarding charities they will not hear strangers, it being the responsibility of the trustees to execute their trusts and of the Attorney-General, on behalf of the Crown as *parens patriae*, to intervene in the courts to secure their enforcement where necessary. But it is open to anyone, including a local authority, to apply to the Attorney-General to bring a relator action. The right of two inhabitants to bring proceedings in relation to a local charity is strictly speaking anomalous, but the right existed under the previous law, and it has been retained because it was thought better to retain it rather than to appear to restrict access to the courts.[33]

Dealings with charity property

Section 29 replaces the existing restrictions on dealings in property forming part of the charity estate, and the classification of charities as plain, endowed or mixed, which has in the past proved such a source of uncertainty to conveyancers, ceases to have any significance. It is now quite simple to decide whether consent is required under section 29 (1) to sell, lease, charge or otherwise

[32] *Hansard* (Lords), March 1, 1960, cols. 570, 571.
[33] *Hansard* (Commons, Standing Committee A), June 28, 1960, col. 286, Solicitor-General.

dispose of charity land. There can be land of three kinds in the ownership of a charity. First, it can be part of the permanent endowment; secondly, it can be land which is not part of the permanent endowment but which has, nevertheless, been bought at some time or other as an investment with funds expendable as income by the trustees and is not occupied by the charity; thirdly, it can be functional land, that is, land which may or may not be part of the permanent endowment but is, or has been, in the use and occupation of the charity. In the case of land in the first and third categories, sanction is needed before it can be charged or disposed of. In the case of land in the second category, no sanction is needed: it is not practicable to extend the system of control to all transactions where the proceeds are expendable as income, and the fact that there is no way of checking that the trustees spend the income to good effect would detract greatly from the value of control in such cases.

" Permanent endowment " is defined in section 46. The definition is much stricter than the definition of " endowment " under the old law. The reason why consent is needed for the disposal, or charging, of land which is permanent endowment is clear: the capital value of the endowment must be preserved and no avoidable risk that it will fall must be taken; furthermore, control ensures that the proceeds of sale are applied *cy-près*. It may be observed that there is no restriction on selling—though there is on charging—property other than land which represents permanent endowment. The reason why consent is needed to the sale of land, but not of investments, is, first, that investments are generally quoted on the Stock Exchange, and this provides a check that a reasonable price is being obtained; and, secondly, that the fact that land is being sold up is often a sign of a radical change in the policy or the state of the charity—*e.g.*, if almshouses are sold.[34]

Functional land was almost invariably part of the old endowment, but it will not necessarily be part of the new, permanent endowment, though section 29 (2) provides, however, that functional land shall be treated as though it were part of the permanent endowment and it is clear that it will in practice often be intended as such, because without it the charity could not operate. A case in point is the premises occupied for its purposes by a village-hall charity. Nor does functional land fall outside section 29 (1) because, as sometimes happens—though it is submitted that it is bad conveyancing practice in view of the provisions of section 29 (1)

[34] *Hansard* (Commons, Standing Committee A), June 28, 1960, col. 325, Solicitor-General.

of the Settled Land Act, 1925—it is conveyed upon trust for sale. The words " or has at any time been occupied " are included in order to prevent the creation of a clear method of avoiding the section.

Section 29 (3) provides that in the case of certain dispositions consent under section 29 (1) shall not be needed, while section 29 (4) provides for the excepting of charities from the requirement to obtain consent. Reference has been made above to the fact that exception from the requirement of registration under section 4 does not necessarily mean that a charity will be excepted from the need to obtain consents under section 29 (1). Exception from registration under section 4 cannot be assimilated with exception from consent orders under section 29, because the principle on which there will be registration is a principle which affects the nature of the charity and the principle of exception from a consent order is something affecting the nature of the property. Whether or not a charity obtains exception from the requirement to obtain consent under section 29 (1) will, it seems, depend upon whether or not the Commissioners are satisfied that adequate safeguards exist to preserve the value of the charity's assets, but some indication has been given of cases where excepting orders may be expected to be made. Thus the intention is that, so far as religious charities are concerned, regulations will except charities from the need to obtain consents when there exists a denominational body, central or provincial, to supervise the transaction, to ensure that disposal is on the most favourable terms, and that any proceeds are properly applied.[35] Where land is held on the trusts of a model trust deed, that deed may form a suitable basis for exception, by requiring the consent of another body, at central or provincial level; and that body may, having provided the funds in the first place, be entitled according to the trust deed to the proceeds of the land, if sold.[36] It is also the intention that consent should be dispensed with in the case of large national charities—the Royal National Lifeboat Institution is an example—which are accustomed to apply their general funds expendable as income on functional land—*e.g.*, in buying houses for their local staff, and selling them as occasion may require. Consent to the sale serves no useful purpose in such a case.[37] When excepting regulations are made, they may refer to named charities, so that conveyancers will be in no doubt as to

[35] *Hansard* (Commons, Standing Committee A), June 30, 1960, col. 342, Mr. Renton.
[36] *Hansard* (Commons, Standing Committee A), June 30, 1960, col. 344, Mr. Renton.
[37] *Hansard* (Lords), March 1, 1960, cols. 648, 649, Viscount Kilmuir, L.C.

whether or not the control imposed by section 29 (1) applies to a given property.[38]

A bona fide purchaser for value of functional land, or land which has been functional land, is given a protection by section 29 (2) which is not given to the bona fide purchaser of land which is permanent endowment and is sold under section 29 (1). The reason for this is that in the case of sales of land coming within section 29 (2) the purchaser has to rely virtually entirely upon what he is told as to the function of the land, particularly in the past; and the fact that it is functional land of a charity—which mere inspection of the documents will not necessarily reveal—may be concealed from him. On the other hand, in the case of a sale under subsection (1) of land which is permanent endowment, the purchaser will be able to look at the vesting deed, which will indicate that the land is permanent endowment (see Settled Land Act, 1925, s. 29 (1)) and accordingly special protection for the purchaser is not needed.[39]

Criticism has understandably been levelled at the procedure whereby, when charity land is being sold, the highest offer must be advertised in the hope of eliciting a better bid, for it is said that the delay which this procedure inevitably entails can result in the proposed sale falling through. The Lord Chancellor demonstrated by examples how in practice this procedure commonly benefits the charity greatly, but at the same time he promised that the Commissioners would consider whether the existing procedure could not be operated more flexibly and how it could be improved.[40]

Company charities; "common good"

Section 30 (1) empowers the Attorney-General to petition for the winding up of a charitable company, a provision which is new. Section 30 (2) is also new and stops an important gap in the law by preventing a corporate charity which alters its objects so that it is no longer charitable from applying for its new, non-charitable, purposes property which it held for charitable purposes before the alteration was made.

Section 31 is also new. It restricts the use of the term "common good" so as to protect common-good funds by giving some warranty of their object and good faith, and thus encourage their formation.

[38] *Hansard* (Lords), March 31, 1960, cols. 563, 564, Viscount Kilmuir, L.C.
[39] *Hansard* (Commons, Standing Committee A), June 28, 1960, col. 324, Solicitor-General.
[40] *Hansard* (Lords), March 31, 1960, cols. 561-563.

Part IV—Miscellaneous Provisions as to Charities and their Affairs

Section 32 replaces the existing obligation on trustees to keep accounts and imposes a duty to preserve accounts for seven years at least, unless the charity ceases to exist and the Commissioners permit the accounts to be destroyed or otherwise disposed of. The accounts of parochial charities are to be sent annually to the parish council, or the chairman of the parish meeting, if there is no council, for presentation at the next parish meeting.

Section 33 provides for the manner in which notice of—*e.g.*, charity meetings, etc.—is to be given to charity trustees.

Section 34 deals with the manner of executing assurances or other deeds and instruments relating to a charity. Subsections (1) (2) and (3) make provision for delegation, subject to the trusts of the charity, to not less than two of the charity trustees of authority to execute documents. Subsection (4) provides that a deed or instrument purporting to be exercised in pursuance of this section is, in favour of a bona fide purchaser for value, to be conclusively presumed to have been duly executed.

The operation of section 35 is not, perhaps, at first sight very apparent. The Trustee Appointment Acts, though not widely known, provided a useful method of appointing trustees of certain charities, notably certain nonconformist charities. The Acts are now repealed, but their repeal in no way affects the position of trusts which had the advantage of them under the old law, for section 35 (6) provides that in the case of such trusts the relevant provisions of the Acts shall be imported into the conveyance or other trust instrument under which the land of the charity is held. Section 35 (1) extends to charities generally the limited provisions of the Trustee Appointment Acts, whereby trustees may be appointed or discharged by means of a resolution of a meeting of the charity trustees, the appointment or discharge being evidenced by a memorandum; but in the case of charities other than those within the contemplation of section 35 (6) the trusts of the charity must provide for appointment or discharge by resolution. The memorandum, if executed as a deed, has the like operation under section 40 of the Trustee Act, 1925 (which relates to vesting declarations as respects trust property in deeds appointing or discharging trustees) as if the appointment or discharge were effected by the deed: section 35 (2).

Section 36 contains miscellaneous provisions as to evidence. In particular, section 36 (1) provides that in proceedings to recover or compel payment of a rentcharge, evidence that it has been paid

at any time for twelve consecutive years is prima facie evidence of the perpetual liability of the property in question to it.

Section 37, which is concerned with parochial charities, as defined by section 45 (1), authorises the transfer of recreation grounds and allotments to parish councils (s. 37 (1)) and provides for the appointment by local authorities of trustees of parochial charities. Section 37 (1) applies to property held for public purposes as well as to that held for charitable purposes. This section is largely re-enactment of existing law.

Repeal of mortmain

The law of mortmain, a feudal survival the purpose of which had long since been lost, is repealed by section 38 (1). Apart from the Mortmain and Charitable Uses Acts themselves, a large number of statutory provisions relevant thereto is repealed. Here the Act goes well beyond the field of charity, for conveyances of land to corporations, as well as to charitable uses, were commonly subject to mortmain, and although companies incorporated under the Companies Acts were generally exempt from the mortmain provisions (*e.g.*, by s. 14 (1) of the Companies Act, 1948), certain companies formed for promoting what were sometimes referred to as "useful purposes," not involving gain (proviso to s. 14 (1) of the Companies Act) and foreign companies (s. 408 of that Act) were within them. The mortmain provisions constituted a trap into which the unwary commonly fell, whether the conveyance in question was to charitable uses, or to a corporation (including, of course, a corporation taking the land for charitable purposes). To take an example from one field of charity alone; the writer has seen a number of conveyances to trustees of land intended to be used for the purposes of a village hall (a charitable purpose), or to a parish council for the purposes of a hall for the council's statutory purposes (which are not charitable), or to a parish council as trustee, upon trust to hold the land on charitable trusts as a village hall, where failure to comply with the mortmain provisions—*e.g.*, to submit the assurance to the Commissioners for recording under section 29 (4) of the Settled Land Act, 1925—has rendered the assurance void. While advantage seems very seldom, if ever, to have been taken of the consequent invalidity, the failure to comply with the law has meant that at best the land has been held upon the user trusts with a possessory title acquired by adverse possession. Section 38 (2) has the effect of validating all such assurances unless advantage has been taken of the invalidity, *e.g.*, by the grantor re-entering; or, unless the land has been used for purposes other than those declared in the assurance

for a sufficient length of time for a possessory title to have been acquired. So for example, if land has been conveyed for the (charitable) purpose of a reading-room, under the Literary and Scientific Institutions Act, 1845, by means of a deed which did not comply with the mortmain provisions (*e.g.*, as to enrolment under section 4 (9) of the Mortmain and Charitable Uses Act, 1888), and has in fact for upwards of twelve years been used for all the normal purposes of a village hall (purposes which are wider than those of a reading-room simpliciter), village hall trusts must be taken to have attached to it and are not now to be displaced; that is to say, the assurance is not allowed to be validated so as to defeat the title acquired by adverse possession by the village hall trustees. Section 38 (3) makes provision for the case where, under the will of a person who died before the passing of the Act, there was a direction to lay out personalty in the purchase of land for charitable purposes. That obligation, abrogated by section 7 of the Mortmain and Charitable Uses Act, 1891, is not revived by this Act: if it were, persons who had ignored the obligation might be held to be in breach of trust. Section 38 (3) gives them complete protection. Reference has been made above to section 38 (4), in considering the final disappearance from the statute book of the preamble to the Charitable Uses Act, 1601.

Section 39 effects the repeal, with the necessary savings, of the obsolete enactments specified in Schedule 5.

Part V—Supplementary

Section 40 gives the Commissioners various powers in regard to orders made by them. Section 40 (2) gives them a new power to give public notice of the making or contents of an order. Section 41 provides for the enforcement of the Commissioners' orders, disobedience to which may be treated as contempt of court. Section 42 deals with provisions to be made for regulating appeals to the High Court against orders and decisions of the Commissioners. Section 43 provides that, save as otherwise provided in the Act, the power to make regulations shall be exercisable by both the Home Secretary and the Minister. Regulations are made by statutory instrument. Section 44 is concerned with expenses arising under the Act and provides for the payment into the Exchequer of fees received by the Commissioners or the Minister. Section 45 provides for the construction of references to a "charity" or to particular classes of charity, and section 46 contains other definitions. Section 47 gives the Parliament of Northern Ireland power to legislate for purposes similar to those of the Act.

Section 48 provides for the amendment of the enactments referred to in Schedule 6, repeals the enactments referred to in Schedule 7, which is divided into two parts containing principal repeals (Part I) and mortmain repeals (Part II), and contains transitional provisions. Section 49 (1) contains the short title. Section 49 (2) provides for the extent of the Act, which extends to Scotland and Northern Ireland only for the limited purposes there mentioned. By virtue of section 49 (3), section 1 with Schedule 1, section 38 with the repeals in Part II of Schedule 7, and section 47 came into force on July 29, 1960, the date on which the Royal Assent was given, while the remainder of the Act comes into force on January 1, 1961.

Conclusion

The justification for the special position enjoyed by charity in English law is public benefit. The object of the Act is the advancement of public benefit while doing nothing—as, for example, by interfering in the administration of trusts—to discourage the giving of charitable bounty. How successfully that object is achieved must depend upon the good sense of charity trustees in co-operating both with the central and with local authorities, upon local authorities making good use of their new powers to ensure that statutory services and charity march as far as possible in step, and upon the central authorities having the means to carry out their functions, and in particular their scheme-making function, so as to enable trustees who are in difficulty over the execution of their trusts to apply the trust property to the best advantage. Clearly, there must be some delay before the scheme of the Act can be fully in operation. In particular, numerous regulations have to be made, and the register has to be compiled. In some respects, however, the Act offers hope of immediate results: thus, a large number of applications for *cy près* schemes may be expected at an early date. It seems inevitable that there will be a great increase in the number of schemes required, and it is to be hoped that the Commissioners and the Minister will be given enough staff to deal with them expeditiously, otherwise trustees will be discouraged and much of the value of the Act will be lost. At all events, great as the pressure upon the Commissioners and the Minister must inevitably be, in some directions their work should be less, for the simplification of the complexities of the statute law relating to charities must surely avoid some of the problems which would otherwise come their way.

ANCIENT LIGHTS FOR AN OFFICE

By A. H. Hudson, Barrister-at-Law

The recently reported decision of Dixon J. in the Irish case of *McGrath* v. *Munster & Leinster Bank*[1] interestingly illustrates a number of points of law and evidence raised by a claim for the infringement of an easement of light. The facts in outline were that the plaintiff, a woman solicitor, had an office in Dame Street, Dublin. The windows of this office received light through an enclosed space at the rear of the building, referred to in the case as a "light well." The defendants rebuilt and enlarged a part of their premises adjoining the well in such a way that the plaintiff complained that the amount of light reaching her windows had been substantially diminished. She therefore brought proceedings claiming an injunction and damages, and it was held that in the circumstances she was entitled to damages in lieu of an injunction.

Much of the judgment is devoted to a critical examination of the various methods used by the expert witnesses of calculating the "grumble line," a test which has frequently been invoked in infringement of light cases as giving a scientific method for determining the amount of tolerable light available in a room.[2] In the present case,[3] Dixon J. explained that the "grumble line" was a line, usually a curve, joining the points on any given plane at which the limit of tolerable illumination was available. Two different methods of determining this line were used by experts called for the defendant bank and yet another by the plaintiff's architect which seems to show that this test of available illumination is less well founded on settled building practice, and hence less "scientific," than some statements in legal textbooks might lead one to suppose.

All the complex calculations of the experts, however, seemed to weigh little with the learned judge. He was critical of the defendant's witnesses for adopting too low a standard of tolerable illumination, and he adverted to criticism of the plaintiff's witness for using a method alleged to be too liable to error. Then, Dixon J.,[4] fortifying himself with citations from earlier Irish

[1] (1960) 94 I.L.T.R. 110.
[2] See Megarry and Wade, *Real Property* 2nd ed., p. 832, citing *Charles Semon* v. *Bradford Corporation* [1922] 2 Ch. 737 and *Fishenden* v. *Higgs & Hill* (1935) 153 L.T. 128 and *Salmond on Torts*, 12th ed., p. 220, note 38.
[3] (1960) 94 I.L.T.R. at p. 115.
[4] *Ibid.* at p. 116.

authorities,[5] expressed doubt in general terms as to the utility of the " grumble line " as a test in these infringement claims. English authority can, of course, be cited for similar criticism [6] but since Dixon J.'s remarks were specifically directed to a situation, the elements of which must be present in many urban properties, these remarks seem to possess a special practical value warranting extensive quotation.

The key passage of general criticism is at pp. 116–117 of the report and runs as follows:

> " The calculations, assuming their accuracy, give a picture of the average effect over the hours of daylight in conditions of uniform diffusion of natural light. They give no idea of the actual effect at any given time. Professional and business offices are not normally used during all the hours of daylight. Probably on balance, the greater use is during the afternoon hours when the source of natural light will be west of south. It is precisely during these hours that the new building will interfere most with the plaintiff's office. From the practical point of view, that is the beneficial user of her office, an alteration to the buildings to the east of her windows would have made little difference compared with a considerable difference caused by an identical alteration to the west. Yet, if I understand their methods correctly, the calculations of the architects would show an exactly equal effect in either case. It is not an answer to this difficulty to say that the effect would in fact be the same, given a uniform diffusion of skylight, because the assumption of such a uniformity is itself unreal. There is no such uniformity when there is direct sunlight. Even when the sky is overcast and there is only skylight—using that term in the sense of extra-terrestially reflected or refracted sunlight—it may be doubted if there is ever uniformity. Observation suggests that, even on a day on which there is only skylight, the intensity of light in any portion of the sky is more likely to be an inverse fraction of the angular distance of that portion from the source of light, the sun. It is not merely on account of the extra sunlight that it is considered desirable to have windows facing south and west. It is for these reasons that I consider the direction of the new obstruction, relative to the windows of the plaintiff's office, of great importance, and, as pointed out,

[5] *Smyth* v. *Dublin Theatre* [1936] I.R. 692, at pp. 699 and 705, *per* Meredith J. and *Gannon* v. *Hughes* [1937] I.R. 284, at p. 290, *per* Johnston J.

[6] See *Sheffield Masonic Hall Co.* v. *Sheffield Corporation* [1932] 2 Ch., at pp. 23–24, *per* Maugham J., cited in *Gale on Easements*, 13th ed., p. 234.

this is a factor of which the 'grumble line' or 'sky-factor contour' fails to take account."

In addition to this practical and forceful criticism of the expert evidence, the case also touches upon a point of law which seems as yet unsettled in England. *Salmond on Torts*[7] expresses the view that the defective structural plan of the plaintiff's premises in respect of lighting will not be a defence for those who infringe his easement of light. That is to say, it is not open to the defendant to escape liability by showing that had the plaintiff's windows been larger or more numerous, no inconvenience would have been caused. *Dent* v. *Auction Mart Co.*,[8] cited in support of Salmond's proposition, reads as follows:

> ". . . it was argued by the defendants in *Dent's* case that the plaintiffs might have made their windows larger. I apprehend it is not for the defendants to tell the plaintiffs how they are to construct their house, and to say, 'You can avoid this injury by doing something for which you would have no protection.' If the plaintiffs constructed their new window, it could be immediately obstructed as being a new window. They have a right already acquired by their old existing window; that right they wish to have preserved intact; and I think that they are clearly entitled to retain the right as they acquired it, without being compelled to make any alteration in their house to enable other people to deal with their property."

Salmond, however, also refers to some observations of Lord Robertson in the course of the argument in *Colls* v. *Home and Colonial Stores*,[9] in which the problem is approached from a very different angle. Lord Robertson said:

> "Can a man by making one window where there should be five to give proper light, and living twenty years in this cave, prevent his neighbour from building a house which would have done no harm to the light if there had been five windows?"

On this *Gale on Easements* remarks,[10] that such a question may arise in the future, but adds that there is no doubt that in many cases a window having a "bad light" has received even greater protection from the courts than the window of a well-lighted room.

No authorities or illustrations are cited by Gale for this last proposition but in *McGrath's* case Dixon J. referred to the Irish case of *O'Connor* v. *Walsh*[11] in which it was held that:

[7] 12th ed., at p. 219.
[8] *Dent* v. *Auction Mart Co.; Pilgrim* v. *Same; Mercers' Co.*, v. *Same* (1866) L.R. 2 Eq. 238, at p. 251, *per* Page-Wood V.-C.
[9] [1904] A.C. 179, at p. 181.
[10] At p. 236.
[11] (1908) 42 I.L.T.R. 20.

> " where premises are already so badly lighted that the smallest deprivation of light would substantially inconvenience the occupiers in their business they are entitled to relief on such deprivation."

This seems to suggest a negative answer to Lord Robertson's query, and to both illustrate and support the propositions put forward by Gale and Salmond. Perhaps it may be that Lord Robertson's query is limited to the position of the original erector of the defective premises when he can remedy his position by opening windows which cannot be obstructed. On the other hand it can, of course, be argued that the servient owner has only himself to thank for failing to take the appropriate steps to prevent an easement being acquired over his land, and that the underlying principle of prescription, that the law should lean in favour of long enjoyment, also tells against the suggestion implicit in Lord Robertson's question.

Dixon J. concludes his judgment with a review of the considerations which led him to grant damages in lieu of an injunction. He cited Lord Macnaghten in *Colls'* case,[12] on the discretionary nature of such a decision and the factors to be borne in mind when arriving at it. Lord Macnaghten had pointed out that in some cases damages could not be an adequate remedy. In others the unsatisfactory conduct of the defendant might make an injunction desirable as a sanction and a warning to others.

> " But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than an injunction."

Dixon J. adopted these words and also said that he was taking into account the fact that the plaintiff had only a limited interest as tenant in her office and furthermore the fact that her original claim for an injunction had not been pressed.

The judgment in *McGrath's* case thus seems to be of significance both on the question of the utility and validity of the shift of the " grumble line " as a test in easement of light cases and on the extent of protection to be given to windows with a " bad light." It may be that the judgment makes a more important contribution to the discussion of the first point, but on neither problem can it properly be ignored.

[12] [1904] A.C. at pp. 192-3.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By Gareth H. Jones, Barrister-at-Law

Windsor Refrigerator Co. Ltd. v. *Branch Nominees Ltd. and Others*
[1960] 3 W.L.R. 108; [1960] 2 All E.R. 568

Deed—Escrow—Delivery by agent of second defendants—Whether deed properly delivered as an escrow—Company—Debenture—Whether appointment of receiver effective.—Although the ultimate issue of this case was whether a receiver had been validly appointed or not, the preliminary point of law is of interest to land lawyers in that it involved a consideration by the court of various questions relating to the delivery of deeds and to the nature and quality of an escrow.

The company in question had issued in 1946 to the first defendants a floating debenture which secured its overdraft with the N. P. Bank, the second defendants, and which provided for the appointment of a receiver. The debenture holders were a wholly owned subsidiary of the N. P. Bank. At the same date as the issue of the debentures, the first and second defendants and the company entered into an agreement, whereby the first defendants covenanted (*inter alia*) to hold the debenture and the money secured by the debentures on trust as a continuing security in favour of the second defendants, the N. P. Bank, and on the company's default to exercise, at the request of the second defendants, all its powers under the debenture.

On February 24, 1958, the second defendants requested the first defendants to prepare a formal demand for payment and to authorise the Reading branch of the N. P. Bank to receive any payments under the debenture. On that same day or on the next day, the second defendants sent to the debenture holders (the first defendants) an instrument appointing G as a receiver, which instrument was sealed on February 25 by two directors of the debenture holders. It was found as a fact that the first defendants did not intend the deed to bind them unconditionally. These documents were then sent to the Reading branch of the second defendants, and their manager, having entered the date of February 28, 1958, in the deed of appointment of the receiver, handed to the managing director of the company the formal demand for payment and his authority to receive payment. When payment was not made, the Reading manager handed to G, who was present, the deed appointing him a receiver under the debentures.

The question which Cross J. was therefore called upon to decide was whether the deed, executed by the first defendants, was effective to appoint G receiver.

The immediate, and ultimately fatal obstacle which faced the defendants was that the Reading manager was not a person who had, under the debentures, any authority to deliver any deed on behalf of the debenture holders: if he was the first defendants' agent, then his

appointment should have been under seal (which it was not) since he was charged to deliver a deed under seal; see *Powell* v. *London and Provincial Bank* [1893] 2 Ch. 555.

The defendants sought to meet this argument in two ways. First they said the appointment was delivered as an "escrow" (a deed delivered subject to a condition or conditions), and the conditions attached thereto were fulfilled when the Reading manager handed G the deed of appointment on February 28. This reasoning did not find favour with Cross J. He considered the dicta of the Court of Appeal in *Foundling Hospital* v. *Crane* [1911] 2 K.B. 367, 374–375, 379, and its judgment in *Eccles* v. *Bryant & Pollock* [1948] 1 Ch. 93, and concluded that the revocable instructions given by the debenture holders to the Reading manager of the N. P. Bank could not be regarded as conditions of delivery. In his view, the deed was an undelivered deed.

The alternative argument of the defendants that the deed of appointment should be regarded as equivalent to a document under hand was also rejected. The learned judge had "no reason to think that the two directors who put their names on the appointment were authorised to do anything else than to witness the affixing of a seal. . . . Here the document in question is on its face a deed and nothing else, and I do not see how I can treat it as though it were an instrument under hand."

This decision bristles with difficulties, for even if Cross J. had held that the revocable instructions given to the Reading manager were conditions attached to the deed, "the further question would have arisen, *viz.*, whether the fact that on February 25, the debenture holders had no power to make an unconditional appointment of a receiver since no demand for payment had yet been made would have precluded them from delivering the appointment on that day as an escrow to take effect after a demand has been made." It is understood that this and other questions, too complex to be dealt with in a short note, will be discussed in a future article in this Journal.

Iveagh (Earl) v. *Martin and Another* [1960] 3 W.L.R. 210; [1960] 2 All E.R. 668

Tenure and tenants in ancient demesne—Manor of Bosham—The extent and nature of the privileges of the tenants of that manor—Whether in these privileges are included the use of the quay and foreshore for private or business purposes.—Public rights of navigation—Whether such rights included the use of the quay and foreshore for the repair of boats on paying a reasonable sum.—Licence—Whether notice of termination was reasonable or not.—It is rare that a recent decision should be as fascinating to the legal historian as it is to the practising lawyer. *Iveagh (Earl)* v. *Martin* is such a case.

The plaintiff was the lord of the manor of Bosham, situated within the port of Chichester, a manor of the ancient demesne, which was described by Maitland as the "original endowment of the Kingship (of) . . . that ancient demesne of the Crown which the Conqueror held when the great settlement of the Conquest was completed and was registered in Domesday Book." [Pollock and Maitland, *History of English Law*

(1923 ed.), Vol. i, p. 383]. Its position was unique; its privileges were jealously regarded by its "men" and scrupulously respected by the Crown.

The ownership of the foreshore was vested in the lord of the manor, who claimed from the defendants, Martin and a limited company formed by him, dues, arising from his (and their) use of the quay during the period September 29, 1953 to August 31, 1956 when Martin was not his tenant, and an injunction to restrain the defendants from making any use whatsoever of the quay. Martin in his defence proudly claimed that as a man of Bosham he was entitled to use the quay for the purpose of his business of marine engineering free of charge; anyway, he argued, he and the company could use the quay *qua* members of the public on the payment of a reasonable fee. Finally, Martin pleaded that the notice from the plaintiff to cease using the quay within seven days was unreasonably short.

The main limb of the defendants' defence was their claim that the defendant Martin as a man of Bosham was entitled to use the quay free of charge, a defence which compelled Paull J. in his erudite judgment to analyse not only the scope of the privilege of men of Bosham but also to determine who were in fact men of Bosham.

Counsel for the defendants, relying on the judgment of Shute J. in *The Case of the Town of Leicester for Toll,* decided in 1585 (2 Leon. 190), had submitted "that the men of Bosham included at least all the inhabitants of the manor and that the defendant, Mr. Martin, was at all material times within that category, even when he occupied the *Invader* which was attached to the piles belonging to the lord of the manor." Martin's success therefore depended on Paull J.'s acceptance of this wide definition; birth could not qualify him since he was born outside the limits of the manor of Bosham.

Paull J. could not however "give the word 'men' the meaning contended for by counsel for the defendants." He limited the common law meaning of "men of Bosham" "as including only those who hold land directly for the lord of the manor." "Men" were either free men holding by free tenure or villein socmen, *glebae ascriptitii* as Maitland called them, who although villeins were privileged because the services they were compelled to perform were certain and because they were protected by the royal writs of the little writ of right close and *monstraverunt*: see Bracton's *De Legibus* quoted by Sir Paul Vinogradoff in his *Villainage in England* (at p. 112) and Fitzherbert's *New Natura Brevium.*

This finding disposed of the defendants' plea. But since Martin was now a tenant of the plaintiff (he had been since 1958), it became necessary to determine his rights and privileges *qua* a man of Bosham to be free of tolls. His lordship, after refusing to imply a lost grant, proceeded to consider in detail the evidence (*inter alia*) of Coke, Fitzherbert and the Bosham Charter of 1607. He concluded, following Coke, that "the common law limits any right of a tenant of the manor of Bosham to be quit of passage and toll to the right in respect of a boat owned by himself and used primarily by him for the purpose of his fishing" and "to use the quay without payment for the purpose, and only for the purpose, of embarking on to and disembarking from such boat or of unloading fish from such boat and of placing fishing tackle on board such boat. He (the man of Bosham) further has the

right to keep such boat moored to the quay for reasonably short periods, but not longer than a reasonable period between two consecutive tides if he decides to fish on each of such tides." These rights, which Paull J. considered to be supported by the evidence before him, a man of Bosham could exercise even against his own lord of the manor, hence the writ of *monstraverunt.*

The defendants' claim that they were entitled as members of the public on payment of a reasonable fee to use the quay for the purpose of repairing boats also failed. The authorities established that the public's rights were attached to their rights of navigation in tidal waters and extended only " in the course of and only in the course of embarking or disembarking or loading or unloading that vessel or indeed in the course of carrying out repairs to the vessel, provided the vessel has arrived in the ordinary course of navigation and that repairs are necessary or desirable before she can resume her voyage " : see *Allnutt* v. *Ingles* (1810) 12 East 527; *Eastern Counties Ry.* v. *Dorking* (1859) 5 C.B.(N.S.) 821 and *Denaby and Cadeby Main Collieries Ltd.* v. *Anson* [1911] 1 K.B. 171.

Finally Paull J. concluded, while the length of notice given by the plaintiff to terminate his use of the quay was reasonable, he was not prepared to grant an injunction in the form demanded. A declaration of rights was in the circumstances of the case quite sufficient.

Roger North once remarked that " the history of a point is . . . a wonderful accomplishment, without it, a lawyer cannot be accounted learned in the law." Paull J.'s judgment in *Iveagh* v. *Martin* is an eloquent recognition of the truth of this observation. On the more human level one cannot but feel a certain measure of sympathy with poor Mr. Martin who even though now a tenant of the lord of the manor is still forbidden the free use of the quay for his business of repairing and fitting out yachts!

Ghana Commercial Bank v. *D. T. Chandiram and Another*
[1960] 3 W.L.R. 328; [1960] 2 All E.R. 865

Mortgage—West Africa—Doctrine of subrogation—Effect of subsequent invalid mortgage to third party—Sale of land under fieri facias. —It is perhaps surprising that the Judicial Committee of the Privy Council, sitting on appeal from the Court of Appeal of Ghana, were ever called upon to consider this case, where the basic point is relatively straightforward and settled although enshrined in somewhat complicated facts.

The debtor D on July 16, 1954, created on Blackacre an equitable mortgage by the deposit of title deeds in favour of Barclays Bank. Six weeks later, on September 4, 1954, the deeds were sent, at the request of D, to the appellant bank, who agreed to hold them for Barclays. On October 27, 1954, D executed a legal mortgage of Blackacre and conveyed it to the appellant bank as security for a loan, whereupon the appellant bank on the same day paid off the loan to Barclays, retaining, of course, the title deeds of Blackacre. In the meantime, however, on September 24, 1954, a judgment creditor of D issued against him a writ of *fi. fa.* for the attachment of Blackacre

under Order 43 of the Ghana Supreme Court (Civil Procedure) Rules, 1954, which prohibited D from alienating Blackacre and "all persons from receiving the same by purchase, gift, or otherwise." In fact rule 11 of Order 43 specifically declared that any alienation after attachment was null and void.

D subsequently let Blackacre to the second respondent and on April 16, 1955, the first respondent bought the property at a court auction.

Competing claims to the rent inevitably arose between the appellant bank and the first respondent and in the present action the appellant bank sought a declaration of its title of ownership and possession.

The Judicial Committee reversed the decision of the Ghana Court of Appeal that the appellant bank had neither any legal nor equitable interest in Blackacre. While Lord Jenkins, who gave the Board's advice, agreed that the effect of Order 43 was to render the legal mortgage of October 27, 1954, null and void, he could not accept that the appellant bank did not become entitled to Barclays equitable mortgage. The benefit of that equitable mortgage remained capable of assignment expressly or by operation of law and *Buller* v. *Rice* [1910] 2 Ch. 277, 282–283, had long since established that "where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit." And this was just the case here. The appellant bank could not have intended the equitable mortgage to be extinguished if the legal mortgage proved to be invalid.

The attachment was thus subject to the appellant bank's interest as equitable mortgagees; see *Wickham* v. *New Brunswick and Canada Ry.* (1865) L.R. 1 P.C. 64, 75–76, *per* Lord Chelmsford. The first respondent, who as purchaser under the *fi. fa.* could not be in a better position than D, took absolutely subject to the equitable mortgage.

Lord Jenkins concluded therefore that the first respondent was, as absolute owner, entitled to possession or receipt of the rents and profits "unless and until otherwise ordered in any further proceedings taken to enforce the equitable mortgage," which proceedings should be taken within a reasonable time.

The principle of *Buller* v. *Rice* was once more vindicated: the third party who pays off the mortgage is subrogated to the mortgagee's position and priority. For this reason, hinted Lord Jenkins, the equitable mortgage could only be security for the sum originally borrowed from Barclays.

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2. *TRUSTS*

By Gareth H. Jones, Barrister-at-Law

Re Tinker's Settlement [1960] 3 All E.R. 85n

Variation of Trusts—Rectification—Arrangement to remove trusts for accumulation and to rectify settlement so as to confer interests on children of settlor's son—Discretion of court under Variation of

Trusts Act, 1958.—This was a bold and unsuccessful attempt to invoke the Variation of Trusts Act, 1958, to vary a settlement, which vested half the corpus on the settlor's son on his attainment of thirty but which made no provision for the benefit of his children if he died under that age, the son's shares going over to the settlor's daughter. Counsel for the applicant-settlor had argued that to approve the proposed scheme, whereby the son's share was to go to his children on his death under thirty, was " a fair and sensible thing to do because somebody had blundered—somebody has forgotten about the son's children "; rectification proceedings would thus be avoided, since the settlor had deposed that, on drafting this new settlement, he had not realised, and it had not been explained to him, that his son's children would take nothing if the son died under thirty.

Russell J. rejected, somewhat sadly, if firmly, the application. He pointed out that he could only exercise his discretion under the 1958 Act if the arrangement was for the benefit of the unborn children of the settlor's daughter—and giving away half of the corpus which could come to the daughter was hardly from their point of view " fair and sensible ! " The claim for rectification was, in his lordship's view, as weak as the claim in *Constandini* v. *Ralli* [1935] Ch. 427, where Eve J. refused to rectify a settlement which had been prepared in accordance with the settlor's written instructions but which omitted a general power of appointment by deed. However, Russell J. did agree to exercise his discretion under the Variation of Trusts Act, 1958, so as to terminate the trust for accumulation of the income of the son's and daughter's shares, which could give rise to a potential estate duty claim. In his view, after weighing all risks, the proposed arrangement " must be for the benefit of the next generation," whose interests the court was concerned to guard.

Re Tinker is a sharp reminder that the Variation of Trusts Act, 1958, does not give the courts *carte blanche* to rewrite trusts. The Act was not designed to provide an alternative procedure for rectification, although, as Russell J. pointed out in the concluding paragraph of his judgment, " it may very well be that one can throw that kind of consideration into the scale besides a financial benefit which has already been established, yet one cannot regard that sort of consideration as a benefit in itself."

Re Robertson's Will Trusts [1960] 3 All E.R. 146n

Variation of trusts—Exercise of special power of appointment—Possible fraud on the power—Circumstances in which court will exercise its discretion under the Variation of Trusts Act, 1958.—This case is yet another illustration of the willingness of the court to exercise its discretion in favour of a scheme, the object of which was to reduce estate duty, free capital and maintain the petitioner's " existing standard of living." The petitioner had a protected life interest under a settlement made by his father, together with a power of appointment for such of his children or remoter issue as he should by deed or will appoint and in default of appointment in trust for all or any of his

children or child who should attain the age of twenty-one years, and if more than one in equal shares." The scheme, submitted for the court's approval on behalf of an infant son and persons entitled under the discretionary trusts in the event of the failure of the petitioner's interest, proposed to divide the capital of the protected life interest between the petitioner and his three children according to their respective interests. This object was to be achieved by the petitioner's appointment of his settled share, subject to his life interest, to his three children and with the capital received under the arrangement the petitioner intended to purchase an annuity.

In the course of argument Russell J. raised the question whether the exercise of the power in these circumstances would not amount to a fraud on the power, since the petitioner might thereby indirectly obtain a benefit in that as a result of the scheme his financial position would actually be improved. In the result, his lordship concluded on the evidence—and he found it unnecessary to discuss the authorities—that "from the inception, the purpose and intention of the appointor, the applicant, was to benefit his three children, and not himself, by making the appointment in question, consistently with his being in no worse position with regard to the trust fund whether the scheme went through or not. It is the fact that he was, at an intermediate stage, advised that his financial position would actually be improved if the appointment was made and the court approved the scheme. I do not think that that justifies the supposition that his purpose or intention was changed or added to."

Re Robertson in fact sounds a clear warning that the procedure of the Variation of Trusts Act, 1958, cannot be used as a cloak for transactions which have as their prime object the financial welfare of the petitioner. The court must be satisfied that any proposed scheme is for the benefit of those persons named in section 1 (1) of the Act. Yet it is to be hoped that the discretion of the court under the Act will not be unduly restricted by the concept of fraud on the power, which was developed before the law of estate duty assumed its modern significance. For circumstances can be imagined when an appointment although technically fraudulent (the appointor benefiting thereby) would be on the whole for the benefit of the beneficiaries under the settlement, in that a considerable saving of estate duty would result.

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3. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Evans v. *Roper* [1960] 1 W.L.R. 814;
[1960] 2 All E.R. 507 (Q.B.D.)

Agricultural Holdings Act, 1948—*notice to quit—application for consent to operation of notice—"desirable in the interests of sound management of the estate of which the land to which the notice relates forms part"—Act of* 1948, *s.* 25 (1) (*b*)—*Agriculture Act,* 1958, *s.* 3.

—The decision in this case turned upon the true construction of section 25 (1) of the Agricultural Holdings Act, 1948, which provides (*inter alia*) that the Agricultural Land Tribunal shall consent to the operation of a notice to quit an agricultural holding if they are satisfied that the carrying out of the notice "is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part" (see Act of 1948, s. 25 (1) (*b*), as amended by Agriculture Act, 1958, s. 3).

The owner of an estate which included two farms (Farm A and Farm B) let to different tenants served on the tenant of Farm A a notice to quit 54 acres of that farm with the intention of transferring that 54 acres to Farm B. The questions raised by case stated were whether the tribunal were entitled to take into account the effect which the transfer of the 54 acres might have (a) on the production from and state of that 54 acres and (b) on the farming of the remainder of Farm A by the tenant from whom the 54 acres were proposed to be transferred. The Divisional Court held that when applying section 25 (1) (*b*) a tribunal should consider the whole and each and every part of the landlord's estate. The tribunal in the present case were right, therefore, to take into account the production from and state of the disputed 54 acres. But they were wrong to take into account the effect which the severance of the 54 acres might have on the farming of and production from the remainder of Farm A, when they were considering whether the landlord had made out a case under section 25 (1) (*b*). This factor may well be relevant when a tribunal is considering whether or not to exercise its discretion to withhold consent under the proviso to section 25 (1), *i.e.*, on the ground that in all the circumstances a fair and reasonable landlord would not insist on possession. But it does not arise under section 25 (1) (*b*).

Commissioners of Crown Lands v. *Page* [1960] 3 W.L.R. 446; [1960] 2 All E.R. 726 (C.A.)

Eviction of tenant—Crown lease—subsequent requisition of demised premises on behalf of Crown—whether requisitioning amounted to wrongful eviction of tenant of Crown—covenant for quiet enjoyment.—The lease in this case was granted by the Commissioners of Crown Lands (now the Crown Estate Commissioners—see Crown Estate Act, 1956, s. 1) for a term of 25 years from 1937. From 1945 to 1955 the premises subject to the lease were requisitioned by the Ministry of Works on behalf of the Crown under the Defence (General) Regulations, 1939. The Court of Appeal held that such requisitioning does not amount to an eviction of a tenant of the Crown, which will justify the tenant in ceasing to pay rent. The court also considered the extent of the covenant for quiet enjoyment which is to be implied into a Crown lease in the absence of an express covenant to that effect.

Lord Evershed M.R. (with whom Ormerod L.J. fully agreed) held that to amount to an act of eviction an act of a landlord or his agent must have certain characteristics which, though possibly incapable of

precise definition, will be regarded as satisfied or not satisfied according to the standards of common sense and ordinary understanding in the light of the facts of each particular case. "Apart from any requisite of wrongfulness," he said, "the landlord's act must (i) be of a permanent character, and (ii) be done with a particular intention, *viz.*, that of disabling the tenant from continuing to 'hold' the subject of his demise, or of depriving him of the 'enjoyment' of the thing demised or some part thereof." The word "permanent" in this context means "not temporary." It does not mean "for ever": nor does it necessarily mean "for the whole unexpired term of a lease." But the meaning of "temporary," it was conceded, may vary greatly according to circumstances.

Upon the facts of this case the learned judge expressed no view on the question whether the characteristic of permanence was present. In his view, however, there was no intention on the part of the Crown *qua* landlord to deprive the lessee of the enjoyment of the premises or that the lessee should no longer continue to hold them. Upon the true construction of the relevant Defence Regulation the Crown as requisitioning authority had merely a right of occupation of the premises as a compulsory licensee without any proprietary interest in them. The intention of the Crown amounted to no more than "an intention to disturb the lessee's enjoyment to the extent only of requiring him to submit to the Crown's occupation of the premises during the 'emergency' without otherwise qualifying the lessee's interest or 'possession' under the demise and on terms that the lessee should by way of 'rent' and otherwise be fairly compensated for the licence." Thus the lessee was in no worse a position than he would have been in, if he had sublet the premises for the period of the requisition.

But an act of eviction must also be wrongful. Indeed Ormerod L.J., though agreeing with Lord Evershed M.R. on the other necessary characteristics of an eviction, thought that this case could be sufficiently determined on the ground that the necessary element of wrongfulness was not present. The word "wrongfulness," however, has also been found difficult to define precisely in this context. An act of wrongful eviction, though more than a mere trespass, does not necessarily involve physical expulsion of the tenant. In many cases, it seems, a breach of the landlord's covenant for quiet enjoyment will suffice. Devlin L.J. indeed suggested that for practical purposes eviction of a tenant and breach of a covenant for quiet enjoyment, which goes to the root of the covenant, amount to the same thing. The element of wrongfulness necessary to an act of eviction means, in his view, "no more than the breach by the landlord of his obligation . . . to leave the tenant undisturbed except to the extent that he has expressly reserved the power to re-enter."

In the present case, where the covenant for quiet enjoyment was left to be implied, it was held that there had been no breach of covenant. Lord Evershed M.R. and Ormerod L.J. both decided the case upon the ground that in cases where a lease has been granted by the Crown the covenant for quiet enjoyment which is implied by law cannot be taken to go so far as to include an undertaking by the Crown not to exercise in relation to the demised premises powers and duties imposed upon the Crown by statute. But they expressed no opinion on what the position would have been, if there had been an express

covenant for quiet enjoyment. Devlin L.J., however, approached the problem rather differently. He preferred to rest his judgment upon a general limitation which applies to all contracts by the Crown or other public authority, namely, that when the Crown (or other public authority) enters into a contract, it does not (at least in the absence of specific words to the contrary) promise to refrain from exercising its general powers under a statute or under the prerogative, or to exercise them in any particular way. Upon that view there can be no eviction of a Crown tenant in cases of this nature, even though the landlord's covenant for quiet enjoyment has been expressed.

Airport Restaurants Ltd. v. *Southend-on-Sea Corporation* [1960] 1 W.L.R. 880; [1960] 2 All E.R. 888 (C.A.)

Landlord and Tenant Act, 1954—*practice—landlords' notice to terminate tenancy—application to county court for new tenancy—subsequent application to High Court for declaration that landlords' notice was invalid—whether proceedings in county court should be adjourned.*—The landlords in this case served a notice to terminate a tenancy of business premises, the rateable value of which did not exceed £500. The tenants applied to the county court for a new tenancy. Then, having been advised that they might be holding the premises under two different tenancies, the tenants applied to the High Court for a declaration that the landlords' notice to terminate the tenancy was invalid. The Court of Appeal (Hodson, Ormerod and Harman L.JJ.) held that in these circumstances the proceedings in the county court should be adjourned till after the High Court proceedings had been concluded. If an adjournment were not granted, the tenants might well suffer injustice in that, if they were forced to continue in the county court before judgment was given in the High Court proceedings, and if they failed in the county court, then they might be estopped in the High Court proceedings from claiming that the landlords' notice was bad. Harman L.J. also observed, as an additional reason for granting the adjournment, that if the county court judge resumed the hearing while the High Court action was undecided, he might very well be deciding a matter of purely academic interest.

Longmuir v. *Kew* [1960] 1 W.L.R. 862; [1960] 3 All E.R. 26 (Ch.D.)

Option to purchase—letting for five years—option to purchase "at any time"—statutory tenancy—whether option exercisable after end of contractual term.—A tenancy agreement, whereby a dwelling-house was let for a term of five years from June 1, 1939, provided that the tenant should have "the right of option to purchase at any time at £675." After the date of the tenancy agreement the house was brought under the control of the Rent Acts by the Rent and Mortgage Interest Restrictions Act, 1939: in 1944 the tenant held over as a statutory tenant; and in 1959 the tenant sought to exercise the option to purchase.

Cross J. held that upon the true construction of this particular tenancy agreement the option was only exercisable during the original term of five years. There is authority for the view that an option to renew a lease may, in the absence of an express agreement to the contrary, be exercised by a tenant who holds over as a yearly tenant (see *Moss* v. *Barton* (1866) L.R. 1 Eq. 474; *Buckland* v. *Papillon* (1866) L.R. 2 Ch. 67) or even as a statutory tenant (see *McIlroy Ltd.* v. *Clements* [1923] W.N. 21): and *Rider* v. *Ford* ([1923] 1 Ch. 541, 545) provides persuasive authority for the view that an option to purchase may also be exercisable by a tenant who holds over from year to year. Ultimately, however, the answer must depend upon the true construction of each particular document: and in the view of Cross J. it is "prima facie most unlikely, especially in these days of Rent Acts, that a landlord would agree in advance to a tenant having a right to purchase the reversion at a price named in the agreement throughout the quite uncertain period during which the tenant may continue to be his tenant by holding over." There may also be a difference between an option to purchase and an option to renew a lease in these circumstances.

Gardner v. *Blaxill and another* [1960] 1 W.L.R. 752; [1960] 2 All E.R. 457 (Q.B.D.)

Option to renew lease—"option of continuing for an extension of seven or fourteen years"—validity of option—holding over by tenant at end of term—subsequent notice exercising option—whether option exercised (a) by conduct (b) by notice.—A lease for seven years from June 24, 1947, at a yearly rent payable quarterly in advance, which contained a covenant by the tenant to keep the premises in good and substantial repair, concluded with a proviso, the material part of which read as follows—"Provided that the tenant has reasonably fulfilled the covenants hereinbefore mentioned he has the option of continuing for an extension of seven or fourteen years . . . ." On June 24, 1954, the tenant, who had at that time forgotten about the option, remained in possession and paid a quarter's rent in advance, which was accepted; and regular quarterly payments were made and accepted thereafter. In 1957 the landlords, who contended that the tenant was a yearly tenant, threatened to increase the rent. Then in February 1958, the tenant gave a notice in writing purporting to exercise the option. The questions which arose were (1) whether the option was valid, and (2) if so, whether it had been validly exercised by the tenant either (a) by conduct in 1954 or (b) by the notice of 1958. In 1958 the premises were not in good and substantial repair.

Paull J. held (1) that the option was valid, and (2) that it had been exercised by conduct. Upon the first point, though much impressed by an argument on behalf of the landlord that the option, being either an option to renew for seven years or an option to renew for fourteen years, was void for lack of certainty, he felt bound by the decision of Sir John Romilly M.R. in *Hersey* v. *Giblett* (1854) 18 Beav. 174 to hold that an "option of continuing for an extension of seven or fourteen years" must be interpreted as an "option of continuing for fourteen years with a break at seven years." Upon the second point

he held that the option had been exercised as soon as rent was paid and accepted in 1954. No provision was made for the service of any notice by the tenant. The precise wording of the material clause, in his view, gave the tenant the option (or ' choice ') of " carrying on (or ' not ceasing to be tenant ') for an extension of fourteen years with a break at seven years "; and the holding over coupled with the payment of rent (though not the holding over by itself) was sufficient evidence of an intention to exercise the option. Moreover, since the landlord had accepted the rent in 1954 without taking any objection with regard to the state of repair of the premises at that time, he had effectively waived such right, if any, as he might have had to object to the exercise of the option on that ground.

But even if the tenant had not exercised the option by conduct in 1954, he had still, in the view of Paull J., exercised it by notice in 1958, despite the fact that the premises in 1958 had not been kept in good and substantial repair. The words " provided that the tenant has reasonably fulfilled his covenants " mean, in the view of Paull J., " provided that he has behaved like a reasonable tenant in relation to his covenants." They do not mean " provided that he has reasonably done the work necessary to fulfil the covenant." This tenant, although he had not done the work, had nevertheless behaved like a reasonably-minded tenant.

King v. *Cave-Browne-Cave* [1960] 3 W.L.R. 204; [1960] 2 All E.R. 751 (Q.B.D.)

Rates—water rate—covenant to pay "all existing and future rates . . . imposed upon the demised premises "—whether water rate included. —The lease in this case contained a covenant by the tenant " to pay all existing and future rates, taxes, assessments and outgoings whether parliamentary, local or otherwise now or hereafter imposed upon the demised premises except only such as the owner is by law bound to pay notwithstanding any contract to the contrary." The demised premises consisted of the second floor of certain business premises. But by the terms of his lease the tenant had the right to use the lavatories and conveniences on the third floor in common with tenants of the third floor. Water was supplied to the whole building by the Metropolitan Water Board by a single supply pipe and distributed to the different parts of the building by internal pipes provided by the owner or occupier of the building. It was inferred as a fact that there had been an agreement between the Board and the owner, whereby the Board had made an assessment of the water rate payable by the owner in respect of the whole building, but had divided that assessment so as to show how much was payable in respect of each of the separate hereditaments in the building. In an action by the landlord to recover the amount of water rate charged in respect of the second floor McNair J. held (applying *Bourne and Tant* v. *Salmon and Gluckstein Ltd.* [1907] 1 Ch. 616) that upon the true construction of the covenant in the circumstances of this particular case the expression " rates imposed upon the demised premises " included the water rate. He rejected a contention by counsel for the tenant that,

since there were no water facilities on the second floor, no water rate could be imposed upon that floor. A water rate is imposed on the owner or occupier of premises, not on the premises themselves (see Water Act, 1945, s. 38), so that "upon the demised premises" must in this context mean "in respect of the demised premises." He also rejected an argument based on *Badcock* v. *Hunt* (1889) 22 Q.B.D. 145, that since the obligation to pay a water rate is voluntarily incurred by an occupier, who is not bound to take a supply of water, a water rate cannot be said to be imposed. The answer must always depend, it seems, upon the particular circumstances of each case. In the present case, as in *Bourne and Tant* v. *Salmon and Gluckstein Ltd.*, the tenant had no option but to take the water supply which was already installed. But if it had been possible for him to obtain water from a different source, the position might well have been different, even though the wording of the covenant had been the same.

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4. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

Burdett-Coutts v. *I. R. C.* [1960] 3 All E.R. 153 (Ch.D.)

Estate Duty—Interest in a business—Reduced rate—Partnership share

Statutory Provision: Finance Act, 1954, s. 28 (1).

Point: Under the Finance Act, 1954, s. 28, a reduced rate of estate duty is applicable in respect of machinery and plant used for the purposes of a business where the business or an interest in the business passes on the death. The Estate Duty Office have always taken the view, which has not been contested by any of the leading textbooks, that where a partnership is dissolved by the death and the share of the deceased partner becomes merely a right to receive his aliquot share of the realisation of the assets on the dissolution, the relief is not available in respect of plant and machinery used in the partnership business. The main ground of this contention was that what passed on the death was not an interest in a business, but merely a debt due in a dissolution. It now appears, however, that where a partnership at will or for joint lives becomes dissolved and liable to be wound up on the death of one of the partners and at the date of the death the partnership business is a going concern, an interest in the business passes on the death of the deceased partner. Each partner where a partnership is being wound up retains an interest in every single asset of the former partnership which remains unrealised and unappropriated and thus, if the partnership business survives the dissolution as a going concern, each partner retains an interest in that business.

Facts and decision: A father and son entered into partnership for joint lives in the business of farmers, the capital being provided wholly by the father and being credited to him. Profits and losses

were borne equally and on the death of either partner, the survivor had an option to purchase the share of the deceased partner in default of exercise of which option the partnership was to be wound up. The father died in 1957 when the business was a going concern and there was plant and machinery used therein. By his will, the father gave all his share in the partnership to his son absolutely, subject to any duties thereon and, in consequence, the son did not exercise the option in the partnership deed. The reduced rate was refused in respect of the machinery and plant of the partnership business and the present appeal was therefore brought.

Held: By Buckley J. that the estate duty payable on the death of the father so far as it was chargeable in respect of the share and interest of the father which passed on his death in the machinery and plant used at the time of his death in the business of the partnership, should be charged in accordance with the reduced scale under the Finance Act, 1954, s. 28. Even on the assumption that there was a dissolution on the death, what passed in the father's estate was an interest in the business. Duty was chargeable *in respect of* the plant and machinery, even though the value of such plant and machinery merely formed one item in the estimation of the value of the father's share and duty was not chargeable in strict accuracy *on* such plant and machinery.

Barclays Bank Ltd. v. *Naylor* [1960] 3 All E.R. 173; [1960] T.R. 203 (Ch.D.).

Income Tax—Annual Payment—Discretionary covenant for children of employees

Statutory Provision: Income Tax Act, 1952, ss. 169, 170.

Point: Although a covenant made by an employer for the benefit of his employees' children is made from motives of commercial advantage, the covenanted sums remain pure income profit of the covenantee if neither the employee nor his children are bound to provide any consideration for the payments by the company and the employee is not placed under any legal or moral obligation to remain in the service of the employer. Further, the fact that sums paid for the benefit of a child in the bona fide exercise of their discretion by trustees incidentally give benefit to the child's parent, by exonerating him from some liability which might otherwise be his, does not cause the payment to the child to lose its character as income of the child and become income of its parent.

Facts and decision: The company, in order to gain more contented staff in its overseas subsidiaries, covenanted to pay to four trustees £27,000 less tax annually for seven years, such sums to be held by the trustees on trust to apply them at their discretion for the maintenance, education or otherwise for the benefit of named beneficiaries who were the children of employees of the overseas subsidiaries. The company retained power to add to the beneficiaries or to delete names therefrom. A beneficiary ceased to be entitled to benefit if his parent ceased to be an employee. The trustees in exercise of their discretion paid a sum to one child and also made a loan to such child equal to the income tax deducted from the payment, which loan was to be repaid after tax had been recovered from the Revenue. This sum was used to pay

the school fees of the child and certain other maintenance expenses. A claim for repayment of the income tax deducted was made by the child and was rejected.

Held: By Cross J. that the payment to the child was his income and he was entitled to make a repayment claim in respect of the tax deducted therefrom. The child was under no obligation to do anything in return for the benefits he received. The father of the child was likewise not under any obligation legal or moral to remain in the service of the company or its subsidiary. In consequence, the case was distinguishable from *I.R.C.* v. *National Book League* [1957] 2 All E.R. 644 and the oft-cited example of a man covenanting to pay annual sums to a butcher in return for a supply of meat.[1]

The Crown's further contention that, as the child's parent had been legally liable to pay the school fees met out of the annual payment to the child, the income was to be treated as that of the parent, was rejected. It is, of course, essential to such rejection that the court should hold, as it did in the present case, that the trustees properly exercised their discretion for the benefit of the child. If the trustees wrongly exercised their discretion, it would still be open to the Revenue to claim that the money applied for the benefit of the child was income of its parent.

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5. *PLANNING CASES*

By V. G. Wellings, m.a.,(oxon), Barrister-at-Law

Marshall v. *Nottingham City Corporation* [1960] 1 W.L.R. 707; [1960] 1 All E.R. 659 (Glyn-Jones J.)

Development—change in use of land from sale and display of portable buildings to sale and display of caravans—no material change.—From 1912 to 1957 land was used for an ever diminishing business of manufacturing, selling and displaying wooden portable garden buildings. A hut on the land was used as an office. In 1957 a purchaser of the land began to use it for the sale and display of caravans and, to a slight extent, of wooden portable buildings, but no manufacture took place. The office hut was used as a sales office. An enforcement notice was served on the purchaser alleging that by using the land (a) for the sale and display of caravans and wooden buildings and, (b) for a building used "as a sales-shop" there had been a material change in the use of the land for which no permission had been granted. Glyn-Jones J., held that neither the fact that the purchaser was a distributor rather than a manufacturer nor the fact that the main purpose was to sell caravans which the previous owner had not sold constituted a material change in user. He also held that the hut as used by the previous owner was a "shop" within the definition in the Use Classes Order, 1950, namely a building used for

[1] *Earl Howe* v. *I.R.C.*, 7 T.C. 289, *Per* Scrutton L.J.

carrying on a retail trade or business in which business the primary purpose was selling goods; that was also the use made by the purchaser and accordingly there had been no development.

R. v. *Minister of Housing and Local Government, ex p. Chichester R. D. C.* [1960] 1 W.L.R. 587; [1960] 2 All E.R. 407 (D.C.)

Purchase notice confirmed by Minister for irrelevant reason.—The Divisional Court quashed the confirmation by the Minister of Housing and Local Government of a purchase notice under section 19 (1) of the Town and Country Planning Act, 1947, on the ground that the Minister had confirmed the notice for a reason which was irrelevant. That reason was that the land in its existing state and with the benefit of temporary planning permissions which had been granted was of substantially less use and value to its owner than it would be if the permission applied for had been granted. The question which the Minister ought to have considered was whether the land in its existing state had become incapable of reasonably beneficial use.

R. v. *Dorset Quarter Sessions Appeals Committee, ex p. Weymouth Corporation* [1960] 3 W.L.R. 66; [1960] 2 All E.R. 410 (D.C.)

Planning authority has no right to appeal against quashing by justices of enforcement notice.—The Divisional Court, deciding the point left open in *Ealing Corporation* v. *Jones* ([1959] 1 Q.B. 384; (1959) 23 *Conveyancer* 235), held that a local planning authority whose enforcement notice had been quashed by justices on an appeal to them under section 23 (4) of the Act of 1947, was not a " person aggrieved " within the meaning of section 23 (5) of the Act notwithstanding that the justices had made an order for costs against them.

THE LIBRARY

Encyclopedia of Planning Law and Practice. General Editor, Desmond Heap, ll.m., p.p.t.p.i. Sweet & Maxwell, Ltd. £10 10s. (including loose-leaf service for 1960).

Encyclopedia of Compulsory Purchase and Compensation. General Editor, R. D. Stewart-Brown, q.c. Sweet & Maxwell, Ltd. £5 5s. (including loose-leaf service for 1960).

These two Encyclopedias replace the *Encyclopedia of Planning, Compulsory Purchase and Compensation*, which was first published in 1949, and which has been of such great service to those whose duties involve a working knowledge of these most involved subjects. So much water has flowed under the planning bridge in the last decade that it was a wise decision to make a fresh start. The two Encyclopedias to some extent overlap but this is due to the way in which the legislation on compulsory purchase has, in modern times, been tacked on to the legislation on planning.

The two new Encyclopedias, like their predecessor, are on the loose-leaf principle which, it must be admitted, is the only one which has the capacity to cope with a subject which continues to be the subject of amendment. At the moment of writing the law relating to the control of caravan sites and the law relating to enforcing planning control are the subject of a Bill (which is in its last stages in Parliament) and few months go by without fresh orders, circulars and decisions of the courts becoming available.

The contents of the Encyclopedias are most conveniently indicated by coloured dividing pages and plastic tabs. In Heap's *Planning Encyclopedia*, after the usual tables, Part I consists of a General Statement which, in Mr. Heap's clear and succinct style, gives a comprehensive view of the whole subject. Part II is a book in itself and contains all the statutes, elaborately annotated, and occupies more than 800 pages. The statute law on this subject has suffered such violent changes in the past that it is a great relief to have it set out in the form in which it is usable today. The first Act printed is the Minister of Town and Country Planning Act, 1943, but as everyone knows, this Minister has suffered a series of metamorphoses and is now an undivided part of the Minister of Housing and Local Government. The Town and Country Planning Act, 1944, which deals with comprehensive redevelopment, though repealed, lives on in two separate forms—one as applied by, and incorporated with, the New Towns Act, 1946, and the second as re-enacted in the Eleventh Schedule to the Town and Country Planning Act, 1947.

The Town and Country Planning Act, 1947, remains the broad platform on which all modern planning law stands. Its planning provisions have remained fairly stable. It is in its financial aspects that the Act of 1947 has received such a mauling. The scheme of a once-for-all purchase by the state of all development rights (Part VI of the Act) proceeded as far as a computation of what those development rights were worth as at the appointed day, July 1, 1948, but the plan that these should be brought out with a global sum (covering Scotland as well as England) of 300 million pounds was abandoned in 1952 and at the same time the parallel system by which a developer had to purchase the right to develop by paying a development charge to the Central Land Board was also abolished. Owners who had paid development charges, or had had their land compulsorily acquired at existing use values or had been prevented from developing, were compensated and provision was made for compensating,

owners who were prevented from developing in the future. This compensation was linked with the computation made under Part VI of the 1947 Act of the prospective loss of development value. These changes were effected by the Town and Country Planning Acts of 1953 and 1954, and the provisions of the latter Act are necessarily most complicated. The changes also involved an alteration in the basis of compensation on compulsory acquisition but the final change in the financial provisions of the Act of 1947 was effected by the Town and Country Planning Act, 1959, which restored the principle of market value as the basis of compensation on compulsory purchase. It is primarily the function of Stewart-Brown's *Encyclopedia of Compulsory Purchase and Compensation* to deal with this. In addition, Heap's *Encyclopedia of Planning* contains, *inter alia*, the National Parks and Access to the Countryside Act, 1949, the Mineral Workings Act, 1951, the Town Development Act, 1952, the New Towns Acts, 1946 and 1959, and parts of the Licensing Act, 1953.

The second volume of Heap's *Planning Encyclopedia* contains in Part III all the very numerous rules and orders. Part IV comprises the circulars issued by the Ministries and other bodies for the guidance of the harassed local government official but which are ignored by the lawyer at his peril. Part V consists of a reprint of the Selected Planning Appeal Decision issued by the Minister and also of an invaluable Digest of Planning Decisions (prepared by Mr. Harold J. J. Brown) which covers not merely the Selected Planning Appeal Decisions but the hundreds of other decisions which have been included month by month in the *Journal of Planning Law*.

A most convenient feature of Heap's *Planning Encyclopedia* is that the index appears in identical form at the back of each volume.

The Central Land Board, having completed its functions, has been dissolved and its Practice Notes do not appear in this Encyclopedia.

Mr. Stewart-Brown has confined his *Encyclopedia of Compulsory Purchase and Compensation* within a single volume.

The General Statement (Part I) is a brilliant short statement of a branch of the law of very great complexity. No one coming fresh to the topic could begin to understand it from a study of the statutes of 1845 to 1959. The enactments which give powers of compulsory purchase for various purposes are most usefully tabulated in the Appendices to Part I which show which procedure is applicable to the acquisition.

The statute law is set out in Part II and herein may be followed all the changes in the basis of compensation on the compulsory acquisition of land. Although the Lands Clauses Consolidation Act, 1845, contained no clear rules, the judges worked out the principle that the value of land taken was its value to its owner. The Acquisition of Land (Assessment of Compensation) Act, 1919, substituted for this the market value of the land. The Town and Country Planning Act, 1944, froze compensation by reference to prices current in 1939. The Town and Country Planning Act, 1947, enabled land to be compulsorily acquired at its existing use value. The Town and Country Planning Act, 1954, added to this the unexpended balance of established development value (as ascertained under Part VI of the 1947 Act) and finally the Town and Country Planning Act, 1959, reverted to a market value basis.

The procedure for compulsory purchase, which was diverse and complex, was unified in the majority of, but not by any means all, cases by the Acquisition of Land (Authorisation Procedure) Act, 1946. The assessment of the compensation which was a function of the justices or of a jury under the Act of 1845, was transferred to a panel of official arbitrators by the Act of 1919, and thence to the Lands Tribunal by the Lands Tribunal Act, 1949.

And lastly the requirement of compulsory acquisition has shifted from acquisition by railway and other promoters in 1845 to local and public authorities at the present day.

This great, confused mass of legislation is most adequately sorted out and made as intelligible as possible by Mr. Stewart-Brown's careful, full and informed annotations.

Part III contains the relevant rules and orders and Part IV the Minister's Circulars, in both cases mercifully less bulky than in the companion Encyclopedia.

Full tables of cases, statutes and a comprehensive index complete a most workmanlike job.

Both Encyclopedias are quite indispensable to those who have to struggle with the subjects which they so adequately cover.

R. P. C.

Williams on Executors and Administrators. Fourteenth edition. By G. W. Keeton assisted by E. H. Scamell. Stevens & Sons, Ltd. 1960. 2 vols. ccxliii and 1344 pp. (£12 12s. net)

Once again, after an interval of seven years, we have a new edition of one of the old classics, edited by two members of the profession who each combine academic distinction with practical experience in a measure to ensure that the proven qualities which previous editions possessed are retained and possibly enhanced.

The present edition follows the pattern of its predecessors, the need for a drastic revision not having arisen, in the opinion of the chief editor, and in point of fact it is difficult to see the necessity for such revision and more particularly what form it should take. There is no virtue in revision for its own sake, especially as in the present instance the sequence of editions has not rendered it impossible to see the wood for the trees.

Whilst fuller and (if one may venture to say) generally adequate treatment has been given to a number of relatively minor topics such as protective trusts, annuities and accumulations, so far as these are the concern of personal representatives, as such, it is to be regretted that at one or two points it was decided to prune a little too much. One has in mind, for instance, the pre-1925 law relating to intestate succession, which is still frequently a practical issue. Again, notwithstanding that the reader is rightly referred to the specialist standard works dealing with the involved topic of death duties, it may have been an error of editorial judgment to dismiss the matter in just over eight pages. Likewise, the excessively short treatment in a chapter of almost equal length of "Family Provision" is not quite satisfactory and its elaboration and reformulation should be reconsidered in future editions.

Although great care has obviously been taken in the revision of the table of cases and index, there still remains a number of omissions and errors which the present reviewer has by chance lighted upon. Thus, *Re Bradley* [1956] Ch. 615 does not appear to be cited at p. 1152, although it is so tabled, and *Re Biss* [1956] Ch. 243 is wrongly referred to in the text at p. 987 as *Re Bliss*. These are, perhaps, small matters but as they concern that part of the book which is an indispensable aid and upon which the practitioner expects to rely, it is unfortunate that they have crept into an otherwise excellent job of work. In connection with the index, it is suggested that some indication should have been given as to where Vol. I ends and Vol. II commences.

It would be unfair and might give a wrong impression of the value of this edition, if one ended on a note of adverse criticism. *Williams on Executors and Administrators* is the sole practitioners' book on the subject and this edition is, as its predecessors, comprehensive yet "handleable" and will continue as an invaluable guide and companion to the practitioner.

P. E.

Preston and Newsom's Restrictive Covenants affecting Freehold Land. Third edition. By G. H. Newsom, Q.C. Sweet & Maxwell, Ltd. xxix, 267 and (index) 10 pp. (£3 3s.)

Preston & Newsom started life in volume 3 of the *Conveyancer* and shows no signs of senescence. Since the second edition Newsom's *Discharge and Modification of Restrictive Covenants*, a volume of reports, has been published and much more ground has now been explored. This has resulted in considerable revision of the chapter dealing with the Lands Tribunal's jurisdiction. Apart from this, there have been no major changes but there has been a certain amount of tidying up: the excursuses have gone and the cases and references have been relegated to footnotes. In this difficult subject there is no better guide and the author always remains entirely practical. Many solicitors, fearful of possible action on ancient covenants, could well bear in mind the author's generalisation, "After all, most covenants made before 1914 can be faulted on one ground or another." Applications for first registration often provide an opportunity that may not subsequently occur for clearing up a title, but the Land Registry will not do the solicitor's work for him. If property is purchased subject to restrictive covenants the Land Registry will note them unless asked not to do so and the solicitor is advised to state why he contends they should not be noted.

It is perhaps surprising that there is still next to nothing on the county court's jurisdiction under what is now section 165 of the Housing Act, 1957, and one can only guess whether proceedings under the section might not in some cases prove cheaper and more satisfactory than those under section 84 of the Law of Property Act, 1925. There is really little for the reviewer to say except to welcome unreservedly this new edition.

E. F. G.

The Law relating to Caravans By Roland J. Roddis, L.M.T.P.I., Barrister-at-Law. Shaw & Sons, Ltd. xix, 150 and (index) 7 pp. (£1 10s.)

The publishers state that the author has arranged to prepare a short supplement, setting out the changes in the law brought about by the new Caravan Sites and Control of Development Act, which will be supplied or sent to every purchaser free of charge. At first blush the idea of a book on the law relating to caravans is an attractive one but second thoughts sow doubts which are not dispelled by the new work. The author has to go into a good deal of the general public health and planning law and when this is subtracted there is not really enough material for a whole book. We did not find it an easy book to read: the style is diffuse and, although the chapter divisions seem coherent, within the chapters this coherence often seems to be lost. Probably the most useful part of the book is the chapter on planning appeals. One gathers that the book is intended not merely for lawyers but for others interested in caravans, but in our opinion only lawyers are likely to find it of use. Fundamentally, the difficulty appears to be that the subject chosen by the author is not apt for treatment as the subject of a book.

E. F. G.

We have also received:—

The Law of Sewers and Drains. Second edition. By J. F. Garner, LL.M., Solicitor. Shaw & Sons, Ltd. 169 pp. (£1 10s.)—This book has been thoroughly brought up to date, by taking into account the new pollution statutes and incidental procedural changes necessitated by the new county court and magistrates court legislation. A number of recent cases in the field is also added. The lay-out of the text, and the frequent subdivisions, make the book easy of reference.

Oyez Tables Nos. 13 (search addressed and reminders, unregistered land) *and 14* (registered conveyancing reminders). The Solicitors Law Stationery Society Ltd. 2s. 6d. and 3s. respectively—Table No. 13 mainly consists of reminders of searches to be made in the Land Charges Register. When a vendor subject to a mortgage to be discharged on completion sells we are told that a search against the mortgage is not needed "but might be desirable sometimes." We wonder when. Addresses of metropolitan boroughs, county boroughs and county councils are given. Table No. 14 gives the Land Registry fees, the compulsory areas and a few notes.